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Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System

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CASH RULES EVERYTHING AROUND THE MONEY BAIL SYSTEM: THE EFFECT OF CASH-ONLY BAIL ON INDIGENT DEFENDANTS IN AMERICA'S MONEY BAIL SYSTEM

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INTRODUCTION

For Father's day 2017, songwriter and recording artist Shawn Carter, better known as "Jay-Z," decided to "take on the exploitative bail industry," writing an essay that discussed the injustices surrounding bail and America's criminal justice system.[1] After helping produce a docuseries titled "Time: The Kalief Brower Story," Carter became enthralled in the matter.[2] He discussed the issues surrounding America's criminal justice system and the bail industry, including bail's enormously high costs, the expense of private attorneys' fees, the bail system's adverse impact on the indigent and their families, and, perhaps most importantly, the complete reversal of notion of being innocent until proven guilty—

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[1] Shawn Carter, *Jay-Z: For Father's Day, I'm Taking on the Exploitative Bail Industry*, TIME (June 16, 2017), http://time.com/4821547/jay-z-racism-bail-bonds/; *see also* Travis M. Andrews, *For Father's Day, Jay-Z Pens Oped about a Predatory Bail System That Separates Families,* WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/06/19/for-fathers-day-jay-z-pens-op-ed-about-a-predatory-bail-system-that-separates-families/.

[2] Carter, *supra* note 1.

or as Carter calls it, being "Guilty Until Proven Innocent."[3] Kalief Brower's story exemplifies the injustice Carter has now worked so hard to remedy. Browder, at sixteen-year-old, was accused of stealing a backpack and arrested on the spot.[4] Browder's family's inability to post bail lead to Browder spending the next three years incarcerated at Rikers Island without a trial, two of which were spent in solitary confinement.[5] Browder attempted suicide several times while awaiting a trial that would never come.[6] Finally, after being released once the charges against him were dropped, Browder took his own life.[7]

Throughout the United States, there are approximately 1.6 million people imprisoned in state or federal detention centers, and of these inmates, roughly 450,000 of them are detained in local jails awaiting trial.[8] This is due in large part to America's money bail system, which disproportionately impacts poor Americans while serving as a mere inconvenience for those with a disposable income.[9] Research shows that of the pretrial detainees unable to post bail, 60% fall within the poorest one-third of Americans and 80% fall within the bottom one-half of the poverty scale.[10] One study conducted on New York City residents found that even when bail was set at or below $500, many of the City's residents accused of crimes still could not afford bail.[11] This is particularly troublesome considering that the vast majority of individuals unable to post cash

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[3] *Id.* ("Millions of people are separated from their families for months at a time—not because they are convicted of committing a crime, but because they are accused of committing a crime."); *see also* JAY-Z, GUILTY UNTIL PROVEN INNOCENT (Roc-A-Fella Records 2000).

[4] Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See* Bernadette Rabuy & Daniel Kopf, *Detaining the Poor* (Prison Policy Initiative 2016).

[9] *See* Melissa Neil, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail,* 13 JUSTICE POLICY INST. (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf.

[10] *See* Rabuy, *supra* note 8, at 1 n.9.

[11] *See id.*

bail are not dangerous, as they are often arrested for low-level, nonviolent offenses.[12] Moreover, recent statistics have shown that while overall crime rates in America are decreasing, our jail populations are actually increasing.[13]

Pretrial detention has detrimental effects on those unable to post bail, including job loss, family breakdown, the inability to prepare an adequate criminal defense, and a greater likelihood of being convicted.[14] Further, pretrial incarceration affects more people than just the poor, as it places enormous financial burdens on taxpayers.[15] In 2011, Attorney General Eric Holder indicated that pretrial detention costs taxpayers roughly nine billion dollars.[16] Also, while the United States Constitution prohibits the government from imposing excessive bail,[17] twentieth century bail reform has given judges significant pretrial discretion in setting bail.[18] This discretion has led to judges requiring defendants to post high, but not necessarily "excessive" bail amounts.[19] A recent adaptation of this judicial discretion is cash-only bail, in which judges require defendants to post their entire bail amount in cash to the court in order to obtain pretrial release.[20]

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[12] *See* Laura Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & The Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1311 (2012).

[13] *See* Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUSTICE INST. 1, 21 (2010); *see also* Aimee Picchi, *The High Price of Incarceration in America*, CBSNEWS.COM May 8, 2014, http://www.cbsnews.com/news/the-high-price-of-americas-incarceration-80-billion/ (indicating that the overall rates for violent and property crimes have decreased by 45% the last twenty years).

[14] *See id.*

[15] *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1356 (2014).

[16] *See* Eric H. Holder Jr., Att'y Gen., U.S. DEP'T OF JUSTICE, National Symposium on Pretrial Justice (June 1, 2011), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-symposium-pretrial-justice;*see also* Picchi, *supra* note 13 (noting that America's overall corrections budget is $80 billion dollars).

[17] U.S. CONST. amend. VIII ("Excessive bail shall not be required.").

[18] *See infra* Sections I.C.3–4.

[19] *See infra* Section I.C.

[20] *See infra* Section II.C.

Despite most state constitutions mandating that all persons charged with noncapital crimes be "bailable by sufficient sureties,"[21] also known as the Consensus Right to Bail,[22] courts are currently divided on whether cash-only bail[23] is constitutional.[24] A recent Fifth Circuit decision took the issue head on, ruling cash-only bail unconstitutional.[25] The Fifth Circuit held that individuals have "a state-created liberty interest" in being bailable by sufficient sureties, and thus, may not be deprived of due process or equal protection

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[21] *See* Schnacke, *supra* note 13, at 4–5.

[22] *See infra* Section II.B.

[23] The Alabama Court of Civil Appeals in Williams v. City of Montgomery, 739 So. 2d 515, 517 (Ala. Crim. App. 1999), defined "cash bail" as "where cash in an amount equal to, or part of, the total sum of bail is paid into court." Cash-only bail within the context of this Note refers to the practice of judges setting a specified amount of bail and requiring the full amount be paid in full for the accused to obtain pretrial release. *See* State v. Brooks, 604 N.W.2d 345, 346 n.1 (Minn. 2000) (en banc).

[24] *Compare Brooks*, 604 N.W.2d at 354 (ruling cash-only bail as unconstitutional), *and* State v. Barton, 331 P.3d 50, 55 (Wash. 2014) (en banc) (ruling cash-only bail as unconstitutional), *with* State v. Gutierrez, 140 P.3d 1106, 1111 (N.M.2006) (ruling cash-only bail as constitutional), *and* Saunders v. Hornecker, 344 P.3d 771, 780-81 (Wyo. 2015) (ruling cash-only bail as constitutional); *see also infra* Sections II.C.1–2.

[25] *See* O'Donnell v. Harris Cty., 2018 WL 851776, at *5–7 (Feb. 14, 2018) ("[S]tate law forbids the setting of bail as an instrument of oppression. Thus, magistrates may not impose a secured bail solely for the purpose of detaining the accused for the purpose of detaining the accused. And, when the accused is indigent, setting a secured bail will, in most cases, have the same effect as a detention order." Accordingly, such decisions must reflect a careful weighing of the individualized factors.") (internal marks omitted). The bail system in Harris County used a fixed fee schedule—a set bail amount—that, in practice, did not stray from the fee schedule. *See* Debra Cassens Weiss, *5th Circuit Says Cash Bail System in Texas County Is Unconstitutional*, ABA J. (Feb. 15, 2018, 1:38PM), http://www.abajournal.com/news/article/5th_circuit_says_cash_bail_system_in_texas_county_is_unconstitutional (discussing *O'Donnell*, 2018 WL 851776). The system, instead, should have considered individual factors, such as the defendant's ability to pay, dangerous propensities, severity of the crime, etc. *Id.* Nonetheless, the procedures in place were held inadequate, as the court in *O'Donnell* held that "bail decision[s] must be made based on individualized factors that weigh the detainee's interest in pretrial release and the court's interest in securing the detainee's appearance." *See id.*

under the law.[26] Notably however, there is no universal rule to follow when analyzing a defendant's constitutional challenge to cash-only bail; instead, courts utilize theories of statutory interpretation to address the meaning and scope of the "sufficient sureties" language.[27] Incidentally, the courts that focus on bail's history or the intent of the framers are overlooking the bigger picture—cash-only bail's effect on the indigent.[28]

It is readily apparent that cash-only bail disproportionately affects those of a low socioeconomic status.[29] Setting cash-only bail for low-income defendants who ultimately cannot afford it punishes these individuals by way of pretrial detention.[30] This detention runs counter to a core principle of America's criminal justice system—

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[26] *See O'Donnell*, 2018 WL 851776, at *5–7. While the court's focus in *O'Donnell* was the cash bail system in Harris County violating due process and equal protection, those claims are not the subject of this Comment.

[27] *See* Saunders, 344 P.3d at 778 ("[I]n interpreting the plain and unambiguous language of the Constitution, we follow harmonizing rules similar to those employed when interpreting statutes."); *see also Brooks*, 604 N.W.2d at 348 ("Resolution of the cash only bail issue turns on interpretation of . . . the phrase 'sufficient sureties.'"); *O'Donnell*, 2018 WL 851776, at *6 ("On the one hand, bail is meant to secure the presence of the defendant in court at his trial . . . [, and o]n the other hand, Texas courts have repeatedly emphasized the important of bail as a means of protecting an accused detainee's constitutional right in remaining free before trial.") (internal citations omitted).

[28] *See infra* Part III; *see also O'Donnell*, 2018 WL 851776, at *3, *8 (holding that the Texas County bail system that failed to consider a defendant's personal circumstances—including indigence and ability to pay—in the bail and pretrial release decisions was unconstitutional).

[29] *See* COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM, 16 (2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/CEA%2BCriminal%2BJustice%2BReport.pdf ("[B]ecause bail is typically assigned without consideration for an individual's resources, financial bail policies often result in detaining the poorest rather than the most dangerous offenders."); *see also* Neil, *supra* note 9, at 13–15 (noting the effect cash bail has on the indigent).

[30] *See* Appleman, *supra* note 12, at 1304 (indicating that pretrial detention "contradicts the requirements of even our minimal pretrial protection for defendants, which holds that punishment can only occur after a conviction").

the presumption of innocence.[31] Thus, judges should refrain from setting cash-only bail and consider its alternatives, including recognizance bonds[32] and electronic monitoring,[33] to alleviate the burdens the money bail system imposes on indigent criminal defendants.[34] While cash-only bail is an effective means of ensuring arrestees' presence at trial and community safety,[35] electronic monitoring[36] and recognizance bonds[37] provide courts with adequate alternatives in lieu of cash-only bail.[38]

Part I of this Note provides a general overview of the money bail system and discusses the history of bail beginning in England and through the adoption of bail in the United States,[39] including the Federal Bail Reform Acts of 1966[40] and 1984[41] and watershed

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[31] For an in-depth look into the role the presumption of innocence plays in the bail-setting process, see Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 1–63 (2005) (discussing the importance of the presumption of innocence and bail during the pretrial process of a criminal prosecution). In the context of this Note, the phrase "presumption of innocence" will be used primarily to refer to the government's inability to incarcerate—or punish—a defendant for failure to make a cash-only bail. *See id.* at 7 (referring to the presumption of innocence as "the government [being] precluded from exacting punishment" and noting that the presumption "afforded to an accused is a safety precaution to assure that only the guilty are punished").

[32] *See* Lydia D. Johnson, *The Politics of the Bail System: What's the Price for Freedom?*, 17 SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUST. 171, 199 (2015) (describing release on one's own recognizance as an alternative to low-risk, poor defendants).

[33] *See* Wiseman, *supra* note 15, 1348–49, 1364–82 (providing electronic monitoring of individuals as a twenty-first century solution to the burdens and inequalities the money bail system imposed on the indigent).

[34] *See* State v. Gutierrez, 140 P.3d 1106, 1111 (N.M. 2006) (cautioning trial court judges to only use cash-only bail as a "last option" after careful consideration of other alternatives).

[35] *See* Philip J. Van De Veer, *No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington*, 26 SEATTLE U. L. REV. 847, 876–77 (2003).

[36] *See* Wiseman, *supra* note 15, at 1348–49, 1364-82.

[37] *See* Neil, *supra* note 9, at 31–32.

[38] *See infra* Section III.C.

[39] *See infra* Part I.

[40] Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (repealed 1983).

United States Supreme Court decisions regarding bail.[42] Part II examines the factors judges use to set bail, the constitutionality of cash-only bail, the states' split on the issue, and competing scholarly views on alternatives to money bail.[43] Part III analyzes the impact cash-only bail has on the indigent and how state courts have ignored the bigger picture—cash-only bail's effect on indigent defendants.[44] This Part argues in favor of individualized bail proceedings and nonfinancial conditions of pretrial release, concluding that the benefits of these solutions outweigh their costs or limitations.[45]

I. ADDICTED TO MONEY: THE EVOLUTION OF BAIL AND THE CURRENT MONEY BAIL SYSTEM

In its most basic sense, bail today is known as an amount of cash or other security that a criminal defendant pays to be released before trial.[46] Once a defendant is arrested for alleged unlawful conduct, the defendant will appear before a magistrate[47] within twenty-four hours to be informed of the charges against the defendant and for bail to be set.[48] A judge is given wide discretion in determining the type of bail to set or whether bail should be

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[41] Bail Reform Act of 1984, 18 U.S.C. § 3142 (2008).
[42] *See infra* Sections I.C.1–4.
[43] *See infra* Part II.
[44] *See infra* Sections III.A–B.
[45] *See infra* Part III.
[46] *Bail*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining bail as "[a] security such as cash, a bond, or property . . . required by a court for the release of a criminal defendant who must appear in court at a future time").
[47] A magistrate is typically "a quasi-judicial officer given the power to set bail, accept bond, [or] accept guilty pleas." *District-Court Magistrate*, BLACK'S LAW DICTIONARY (10th ed. 2014). A magistrate is usually a judicial officer with limited jurisdiction and authority as compared to a judge. *Magistrate*, BLACK'S LAW DICTIONARY (10th ed. 2014). This Note will use magistrate and judge interchangeably as a judicial officer who sets bail.
[48] *See* Paul Bernard Wice, *Bail and Its Reform: A National Survey* 12 U.S. Dep't. of Justice (1973); *see also* Van De Veer, *supra* note 35, at 849.

denied.[49] However, the presumption of innocence, which protects the accused from punishment and incarceration before conviction, provides a counter balance to the judge's discretion and mandates that pretrial *release* be the rule and pretrial *detention* be the exception.[50] This presumption is fundamental in the bail-setting process.[51]

Despite pretrial release being the norm, two competing objectives of bail have led to many criminally accused individuals sitting in jail rather than out on bail.[52] In addition to preserving the accused's presumption of innocence,[53] the second and more notable objective of bail is that courts set bail to ensure the accused's appearance at trial.[54] These purposes date as far back as the Statute of Westminster[55] in Anglo-Saxon England, through Colonial America and are still very much alive in the criminal justice system today.[56]

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[49] *See* Wice, *supra* note 48, at 11; *see also* Barbara Gottlieb, NAT'L INST. OF JUSTICE, *Public Danger as a Factor in Pretrial Release: A Comparative Analysis of State Laws* 65 (1984) ("Statutes often list factors that judicial officers should take into consideration in establishing conditions of release, but the weight to be given to information concerning potentially relevant factors is within the judicial officer's discretion.").

[50] *See* Appleman, *supra* note 12, at 1331 (explaining that the Bail Reform Act of 1984 reaffirmed pretrial release as the norm).

[51] *See* Stack v. Boyle, 342 U.S. 1, 7–8 (1959) (Jackson, J., concurring) ("[B]ail . . . is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.").

[52] *See* Wiseman, *supra* note 15, at 1403–04 ("[T]housands of criminal defendants around the country are imprisoned to ensure their presence at trial despite being eligible for release.").

[53] *See, e.g.*, State v. Barton, 331 P. 3d 50, 55 (Wash. 2014) (en banc); State v. Hance, 910 A.2d 874, 879 (Vt. 2006).

[54] *See, e.g.*, Trujillo v. State, 483 S.W.3d 801, 806 (Ark. 2016); Saunders v. Hornecker, 344 P.3d 771, 781 (Wyo. 2015); State v. Jackson, 384 S.W.3d 208, 216 (Mo. 2012) (en banc); State v. Gutierrez, 140 P.3d 1106 (N.M.2006).

[55] Statute of Westminster, 1275 § 3 Edw. 1 c. 15 (Eng.).

[56] *See* June Carbone, *Seeing Through the Emperor's New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 517 (1983).

A. Money in the Bank: Common Forms of Bail

If a judge decides the accused's risk of pretrial flight or danger to the community is low, then that judge may impose certain forms or conditions of pretrial release to ensure the accused's presence at trial.[57] The most frequent form of bail that judges impose is cash bail.[58] For cash bail, a judge sets a fixed amount of money and the accused either pays the court the full amount of the bond or pays 10% of the bail amount to the court or bail bondsman.[59] If the defendant deposits 10% of the bond amount to the court directly and does not miss a court appearance, 90% of the defendant's 10% deposit is returned to the defendant.[60] In addition to cash bonds, judges may impose pretrial release conditions as a form of bail, in which defendants' pretrial release is subject to their compliance with drug tests, pretrial services, and other community-supervision requirements.[61] There is also the least restrictive form of bail known as a recognizance bond, or a release on one's own recognizance.[62] A recognizance bond allows defendants to be

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[57] *See* Stack v. Boyle, 342 U.S. 1, 9 (1951) (Jackson, J., concurring) ("The question when application for bail is made relates to each one's trustworthiness to appear for trial and what security will supply reasonable assurance of his appearance.").

[58] *See* Wice, *supra* note 48, at 10. The court may also release defendants on property bonds, in which property is offered as collateral in lieu of money. *See id.* at 11. Courts rarely use property bonds, however, because such bonds raise ethical dilemmas if the defendant fails to appear. *See id.*

[59] *See id.* at 10. Because this Note focuses on a trial court's imposition of cash-only bail and the alternatives to that particular method of bail, the use of commercial bail bondsmen will not be discussed in depth. It is worth noting, however, that because "[c]ommercial bondsmen rarely lend bail money of $1,000 or less, their services are usually too expensive for low-income or indigent offenders." *See* Appleman, *supra* note 12, 1306. Thus, commercial bail bondsmen do not represent an adequate alternative for low-income defendants. *See id.*

[60] *See* Wice, *supra* note 48, at 10 (discussing the differences between defendants paying the court 10% of the bond amount versus paying commercial bail bondsmen 10% of the bail amount, in which the defendant will not recover any of his 10% payment).

[61] *See id.* Neil, *supra* note 9, at 7; *see also* Wice, *supra* note 48, at 11.

[62] *See* Wice, *supra* note 48, at 11–12.

released pretrial without posting a security or complying with any court-ordered conditions.[63] While a recognizance bond may seem like the least trustworthy device to ensure defendants' appearance at trial, bail reform projects suggest that recognizance bonds are an effective tool in ensuring defendants' attendance at trial.[64]

B. Paper Trail: The Origins of Bail from Anglo-Saxon England to Colonial America

In the late Anglo-Saxon era, England created the concept of bail out of concern that people who were sued in private grievances would flee to avoid paying money to their injured victims.[65] During the Norman Conquest[66] in the eleventh century, however, the state began to govern private disputes, imposing capital and corporal punishment instead of monetary fines as a sentence.[67] This alteration of punishment during the Norman Conquest gave criminal defendants more incentive to flee out of fear of physical harm, which lead to judges using bail as a means of incarcerating criminal defendants to ensure their presence at trial.[68] In response, Parliament passed the Statute of Westminster,[69] which differentiated between bailable and nonbailable offenses.[70] The Statute protected the accused from

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[63] *See* Neil, *supra* note 9, at 7 (noting that recognizance bonds only require defendants to provide a signature agreeing to appear for future court dates). Pretrial defendants may also be released on an unsecured bond, in which the accused signs a contract agreeing to appear in court and accepting liability for a set bond amount if the accused fails to appear. *See id.*

[64] *See infra* Section I.C.2.

[65] *See* Schnacke, *supra* note 13, at 1–2. In order to ensure that compensation would be paid, the cost of pretrial release was identical to the amount payable to the injured party. *See* Carbone, *supra* note 56, at 519–20, describing this bail system as "perhaps the last entirely rational application of bail," as its purpose was to ensure the victim or victim's family was properly compensated for their loss.

[66] *Norman Conquest*, ENCYCLOPEDIA BRITANNICA, *available at* https://www.britannica.com/event/Norman-Conquest (last visited April 30, 2018).

[67] *See* Carbone, *supra* note 56, at 520–21.

[68] *See id.* at 522.

[69] Statute of Westminster 1275, 3 Edw. 1 c. 15 (Eng.).

[70] Statute of Westminster 1275, 3 Edw. 1 c. 15 (Eng.); *see also* Matthew Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909,

judges' abusive bail practices while providing both consistency and certainty in bail administration.[71] Ultimately, other than capital offenses, which were not bailable, bail was considered a right.[72]

After many centuries of governance in the bail-setting process, the Statute of Westminster gave way to reform.[73] Parliament passed the Habeas Corpus[74] Act of 1679,[75] which established procedural safeguards for the criminally accused and prevented long delays between arrest and the bail hearing.[76] Despite these procedural safeguards, the Act still left open one glaring problem surrounding bail—judges setting "impossibly high bail" amounts such that defendants could not afford pretrial release.[77] These high bail amounts operated as an effective denial of bail and lead to defendants being detained indefinitely.[78] However, the passage of

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917 (2013) ("For all offenses that were bailable, officers of the crown had no power to deny bail: persons accused of bailable offenses 'shall from henceforth be let out by sufficient Surety, whereof the Sheriff will be answerable and that without giving ought of their Goods." (quoting Statute of Westminster 1275, 3 Edw. 1 c. 15 (Eng.))).

[71] *See* Carbone, *supra* note 56, at 524.

[72] *See* Hegreness, *supra* note 70, at 918 ("[F]or all of English history, from before the [Norman] Conquest until the time of American independence, only the most serious of felonies were not bailable, and bail was available not as a matter of judicial discretion but as a matter of right.").

[73] *See* Carbone, *supra* note 56, at 527–29.

[74] *Habeas Corpus*, BLACK'S LAW DICTIONARY (10th ed. 2014). Habeas corpus means "that you have the body." *Id.* Habeas corpus is meant to ensure that a person's imprisonment or detention is not illegal. *Id.* While habeas corpus provides defendants with the right to be heard and to be released from unlawful detention, the Constitution does not indicate when such detention is unlawful. *See* Hegreness, *supra* note 70, at 912.

[75] Habeas Corpus Act of 1679, 31 Cha. 2 c. 2 (Eng.).

[76] *See* Carbone, *supra* note 56, at 528.

[77] *See* Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 967 (1965) [hereinafter Foote, *Constitutional Crisis in Bail*] (noting that "by setting impossibly high bail the judges erected another obstacle to thwart the purpose of the law on pretrial detention").

[78] *See* Hegreness, *supra* note 70, at 919 ("After the Habeas Corpus Act [,]. . . one great loophole remained: Officials could 'requir[e] bail to a greater amount than the nature of the case demands.' Such excessive bail was a *de facto* denial of bail for bailable offense, violating the spirit, though not the letter, of the law." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *297)).

the English Bill of Rights in 1689 quickly closed this judicial loophole,[79] as it provided people with the first prohibition against excessive bail.[80] Eventually, all these protections against abusive bail practices—including bail as a matter of right in noncapital cases, habeas corpus, and protection against excessive bail—became fundamental to bail in colonial America.[81]

However, while America's Constitutional framers adopted many of the essential bail rights from English Parliament, the framers left out explicit language regarding an absolute right to bail in noncapital cases.[82] Instead, the framers afforded citizens no federal right to bail, leaving the right to bail in the hands of Congress and the states.[83] Following the ratification of the United States Constitution, Congress passed the Judiciary Act of 1789,[84] which

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[79] English Bill of Rights of 1689, 1 W. & M. Session 2 c. 2 (Eng.).

[80] *See* Hegreness, *supra* note 70, at 919. The English Bill of Rights excessive clause reads: "That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." *See id.* at 919 n.30 (quoting English Bill of Rights of 1689, 1 W. & M. Session 2 c. 2 (Eng.)).

[81] *See id.* at 919 ("These constitutional statutes were the pillars of bail in colonial America and shaped the colonists' understanding of bail.").

[82] *See* Foote, *Constitutional Crisis in Bail*, *supra* note 77, at 968. These elements the framers integrated from English Parliament included: (1) the distinction between bailable offenses, nonbailable offenses, and those left to the discretion of the judges who determine a defendant's ability to make bail; (2) effective habeas corpus procedures for accused detained pretrial; and (3) protection against excessive bail. *See id.*; *see also* Hegreness, *supra* note 70, at 946 ("The Federal Constitution, therefore, does not explicitly guarantee the right to bail [.]").

[83] Carbone, *supra* note 56, at 533. After describing the states enactment of a right to bail, Carbone notes "The Constitution of the United States . . . guarantees only a right to have bail determined in accordance with law. Every person subject to arrest enjoys . . . a guarantee that the bail set not be excessive. But the Constitution does not define which crimes are bailable, nor which defendants can be detained. That definition—the definition establishing the parameters of the right to bail—remains entrusted to Congress and the states."

[84] Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91. The Act reads "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and the usages of law."

worked in concert with the Eighth Amendment[85] to create three distinctive features surrounding bail: (1) that bail should not be excessive; (2) that defendants' right to bail in noncapital cases vests upon the discretion of the court; and (3) that bail is meant to assure the appearance of the accused at trial.[86] While these features would remain largely untouched until the mid-twentieth century,[87] the consequences of the framers' omission of an explicit, absolute right to bail in noncapital cases has caused uncertainty and inconsistency among legislatures, courts, and legal scholars today.[88]

C. It's All About the Benjamins: Twentieth Century Bail, Its Reform, and the Shift Towards Today's Money Bail System

After the Judiciary Act of 1789, the next major changes to bail came in the 1950s with the Supreme Court decision *Stack v. Boyle*.[89] After the number of pretrial detainees began to rise, Congress worked to ensure that bail and pretrial release were more accessible to the accused.[90] However, after the Nixon Administration began the "war on crime" in the 1960s and 1970s, the concept of bail changed again, making bail less accessible.[91] This last major reform to bail culminated with the passing of the 1984 Bail Reform Act, which the Supreme Court upheld as constitutional in *United*

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[85] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").
[86] *See* Schnacke, *supra* note 13, at 5.
[87] *See infra* Section I.C.
[88] For a description of the history and debate surrounding the right to bail, *see* Foote, *Constitutional Crisis in Bail, supra* note 77, at 969–89 (calling the omission of an explicit right to bail in the Federal Constitutional an "anomaly," but concluding that a right to bail is implied in the Constitution); *see also* Hegreness, *supra* note 70, at 915–16 (arguing for the Fourteenth Amendment to protect citizens' right to bail); *see also infra* Section I.C (discussing the inconsistencies among the Supreme Court, Congress, and the general public with regard to bail); *infra* Part II.
[89] *See* Stack v. Boyle, 342 U.S. 1 (1951).
[90] *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (repealed 1983).
[91] *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; *see also infra* Section I.C.3.

States v. Salerno.[92] Since that time, the decision to grant or deny bail has largely remained within the discretion of the judiciary, who may effectively deny bail based on the accused's potential dangerousness to the community.[93]

1. Give'em the Loot: The Supreme Court Takes on Bail, Part I

In the 1950s, the Supreme Court decided two watershed cases that led to Congress's passage of the Federal Bail Reform Act of 1966.[94] In 1951, the Court decided *Stack v. Boyle*,[95] which held that persons arrested for a noncapital offense are unequivocally entitled to bail as of right.[96] In *Stack*, the trial court set a uniform bail at $50,000 for each of the twelve defendants,[97] despite the defendants providing the judge with evidence of their indigence and inability to pay the high bail amount.[98] Ordering that the case be remanded to fix a reasonable bail for each of the defendants, the Court determined that setting an unusually high bail amount based on the indictment alone is arbitrary.[99] The Court reasoned that pretrial release gives the accused an opportunity to prepare a defense

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[92] *See* United States v. Salerno, 481 U.S. 739, 741 (1987) (upholding the 1984 Bail Reform Act as constitutional against due process claims).

[93] 18 U.S.C. § 3142(b) (1984) ("The judicial officer shall order the pretrial release of the [accused] . . . unless the judicial officer determines that such release . . . will endanger the safety of any other person or the community.").

[94] *See Stack*, 342 U.S. at 1; Carlson v. Landon, 342 U.S. 524, 524 (1952).

[95] *Stack*, 342 U.S. at 1.

[96] *Stack*, 342 U.S. at 4 (explaining that "[u]nless the right to bail before trial is preserved, the presumption of innocence would lose its meaning").

[97] The defendants in *Stack* were arrested for violating the Smith Act, an anti-communist regime, and were charged with conspiracy to overthrow the government. *Id.* at 3. The trial court initially set bail for each defendant at a range from $2,500 to $100,000; however, the government motioned for the trial court to increase bail to $50,000 for each defendant. *Id.*

[98] *Id.* In granting the government's motion to increase bail, the trial court relied on information that four people, who were previous charged with the same violation of the Smith Act and released, had forfeited their bail and fled. *Id.* However, none of those four fleeing defendants were the twelve defendants in *Stack*. *Id.* at 4.

[99] *See id.* at 6–7.

and prevents the government from inflicting punishment before a conviction.[100] Justice Jackson's concurring opinion, however, may have laid the groundwork for the Court and Congress to decline bail rights in the future.[101] Justice Jackson determined that not every defendant is *entitled* to bail, but instead, is only entitled to a reasonable *opportunity* to make bail.[102]

Three months later, the Court decided *Carlson v. Landon*,[103] which limited the Court's holding in *Stack*.[104] In *Carlson*, the Department of Immigration and Natural Services detained individuals and charged them with being foreign aliens who were members of the Communist Party.[105] Notably, the Department argued that pretrial detention was warranted because the arrestees were previous members of the Communist Party who posed a danger to the United States.[106] After determining that the defendants were properly denied bail,[107] the Supreme Court—following Justice Jackson's

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[100] *See id.* at 4–5. The Court further held: "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . [T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of the accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment." *Id.* at 5.
Id. (internal citations omitted).
[101] *See id.* at 10 (Jackson, J., concurring).
[102] *See id.*
[103] *Carlson*, 342 U.S. at 524.
[104] *Compare Stack*, 342 U.S. at 6 (Vinson, C.J.) (describing a defendant's right to bail as "unequivocal"), *with* Carlson, 342 U.S. at 545 (denouncing any absolute right to bail and holding the excessive bail clause merely provides that bail shall not be excessive).
[105] *Carlson*, 342 U.S. at 527. The arrestees brought forth numerous claims, including violations to their Fifth Amendment Due Process rights, their Eighth Amendment rights, and a constitutional attack on to the Immigration Act that allowed for their pre-deportation detention. *Id.*
[106] *Id.* at 529.
[107] *Id.* at 541 ("[B]ecause of Congress's understanding of [alien Communists] attitude towards the use of force and violence in such a constitutional democracy [,] . . . evidence of membership plus personal activity in supporting and extending the Party's philosophy concerning violence gives adequate ground for detention.").

concurrence in *Stack*[108]—ruled that the Eighth Amendment did not provide "a right to bail in all cases, but merely . . . that bail shall not be excessive."[109] Thus, leading into the 1960s, the Supreme Court's decisions established that bail and pretrial release were important, but not unlimited.[110]

2. Blowin' Money Fast: Moving Away from Money Bail with the Manhattan Bail Project and the 1966 Federal Bail Reform Act

The mid 1960s brought changes to earlier bail procedures, marking the first significant bail legislation since the Judiciary Act of 1789.[111] Judges—similar to English judges before the passage of the English Bill of Rights in 1689[112]—used their discretionary authority to set high and unattainable bail amounts for defendants to prevent their release before trial.[113] Justice initiative groups began to notice the effect that these discretionary decisions had on the poor.[114] Empirical evidence gathered in the wake of the *Stack* and *Carlson* decisions concluded that individuals unable to post bail

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[108] *See Stack*, 342 U.S. at 10 (Jackson, J., concurring) (finding that "not . . . every defendant is entitled to bail [,] . . . but he is entitled to an opportunity to make [bail] in a reasonable amount").

[109] *Carlson*, 342 U.S. at 545. The Court went on to hold, "the very language of the [Eighth] Amendment fails to say all arrests must be bailable." *Id.*

[110] *See* Schnacke, *supra* note 13, at 9 ("With these two cases, the Supreme Court established that while a right to bail is a fundamental precept of the law, it is not absolute.").

[111] *See* Appleman, *supra* note 12, 1329–30.

[112] *See supra* notes 79–80 and accompanying text.

[113] *See* Schnacke, *supra* note 13, at 10.

[114] *See* Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1035 (1954) [hereinafter Foote, *Compelling Appearance in Court*] (describing that once state courts had failed to consider an accused's financial condition in the bail-setting process, "[t]he elimination of the financial factor resulted in bail being set in amounts which . . . 'are too low to deter the rich, but high enough to prohibit the poor'" (quoting Reginald Heber Smith, *Justice and the Poor,* 23 CAMPBELL L. REV. 74 (1919))).

were not only poor,[115] but also more likely to be convicted than defendants released pretrial.[116] As a result, the Manhattan Bail Project of 1961 took hold, helping criminally accused secure pretrial release while providing an alternative to the money bail system.[117]

The Manhattan Bail Project's purpose was to test whether more defendants could be released on their own recognizance if judicial officers were given more information on defendants' character and reputation within the community.[118] The Project operated under the assumption that defendants with close ties to the community were the least likely to flee.[119] After measuring defendants' likelihood of fleeing based on communal ties,[120] the Project's workers recommended to the courts the best candidates to be released on their own recognizance in lieu of a money bond.[121] Ultimately, the Project succeeded—not only because less than 1% of the total defendants released on their own recognizance failed to appear in court[122]—but also because the Project's success gained national attention, paving the way for Congress to codify bail reform.[123]

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[115] *See* Schnacke, *supra* note 13, at 10; *see also* Neil, *supra* note 9, at 6 ("In 1954, reports began to show that an increasing majority of people detained while awaiting trial were of low income.").

[116] *See* Foote, *Compelling Appearance in Court*, *supra* note 114, at 1058 ("[A] jailed defendant's inability to search out evidence and persuade witnesses [o]n his behalf to testify . . . suggests that the handicap of being in jail may result in a number of convictions which would not occur were the defendant given his liberty during the pretrial period.").

[117] *See* Schnacke, *supra* note 13, at 10.

[118] *See* Gottlieb, *supra* note 49, at 7.

[119] *See* Carbone, *supra* note 56, at 552–53. Carbone indicates that the Manhattan Bail Project used a point system to measure defendants' communal ties and also considered "defendant[s'] prior record, family ties in the area, employment or school attendance, and length of residence in the community." *Id.* at 533.

[120] *See id.*

[121] *See* Carbone, *supra* note 56, at 552–53; *see also* Schnacke, *supra* note 13, at 10 ("[T]he Manhattan Bail Project was designed to provide information to the court about a defendant's ties to the community and thereby hope that the court would release the defendant without requiring a bail bond.").

[122] *See* Schnacke, *supra* note 13, at 10.

[123] *See* Carbone, *supra* note 56, at 533.

After the Manhattan Bail Project, Congress passed the Bail Reform Act of 1966.[124] Congress passed the Act in hopes of encouraging judges to use nonmonetary release conditions due to money bail's adverse effect on the poor.[125] The Act mandated that pretrial release be based on the most minimal release conditions possible while still ensuring defendants appeared at trial.[126] Ultimately, the Bail Reform Act of 1966 was a high mark for Congress and the criminal justice system, as it made bail and pretrial release more accessible to poor defendants accused of low-level, nonviolent crimes.[127] The Act affirmed the presumption in favor of pretrial release and moved away from judges' practice of setting impractical monetary bail requirements.[128] Moreover, the Act did not permit judges to consider defendants' potential danger to the community if released before trial.[129] However, a change in political power brought a new regime that continues to affect pretrial release today.[130]

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[124] *See* Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (repealed 1983); *see also Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, 976 (1961) (noting that where risk of flight is great, "judges frequently [] deny bail in such cases simply by setting bail so high that the accused cannot meet it," which is contrary to the statutory and constitutional protections of many jurisdictions).

[125] *See* State v. Brooks, 604 N.W.2d 345, 350 (Minn. 2000) (en banc) (summarizing the events leading to the passage of the 1966 Bail Reform Act).

[126] 18 U.S.C. §3146(a) ("Any person charged with an offense, other than an offense punishable by death, shall . . . be ordered release pending trial[,] . . . unless the [judicial] officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required."); *see also* GOTTLIEB, *supra* note 49, at 6 (indicating that the Federal Bail Reform Act of 1966 sought to make the bail decision more fair and rationale, requiring judges to release defendants on the "least restrictive conditions that would ensure their appearance at trial").

[127] Carbone, *supra* note 56, at 554–55 ("The Bail Reform Act [of 1966] . . . permit[ted] greater pretrial release of those unlikely to face harsh sanctions after trial.").

[128] *See id.* at 553.

[129] *See generally* 18 U.S.C. §§ 3146–3152 (omitting any consideration of defendants' future dangerousness in pretrial release decisions).

[130] *See infra* Section I.C.3.

3. Dead Presidents: The Nixon Effect and the Bail Reform Act of 1984

After Congress ushered in a new era of bail reform in the 1960s, public concern over America's recent increase in crime, particularly among defendants out on bond pending trial, called for a more restrictive bail process.[131] Because judges could not consider a noncapital defendant's potential dangerousness to the community, many saw the 1966 Bail Reform Act as failing to address public safety.[132] Once President Richard Nixon was elected, however, bail considerations and bail accessibility began to change.[133] President Nixon's "law and order" campaign mandated pretrial detention for criminally accused who presented a clear danger to the community.[134] President Nixon's campaign ultimately led to a major change in bail, as it allowed courts to detain noncapital defendants prior to trial without bail based solely on their *potential* danger to the community.[135]

In response to the increased crime rates involving pretrial detainees as perpetrators,[136] Congress passed the Bail Reform Act of 1984 in conjunction with the Comprehensive Crime Control Act of 1984.[137] While the 1984 Bail Reform Act restated Congress' earlier initiatives to keep pretrial release the rule and pretrial detention the exception, the Act nonetheless allowed judges to deny defendants

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[131] *See* Schnacke, *supra* note 13, at 17.

[132] *See id.* ("Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions.").

[133] *See* Hegreness, *supra* note 70, at 915 ("Th[e] war on bail, along with the broader war on crime, began with President Nixon's election in 1968.").

[134] *See id.* at 956–58.

[135] *See id.*

[136] *See* Schnacke, *supra* note 13, at 17 ("The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond."); *see also* United States v. Salerno, 481 U.S. 739, 742 (1987) (noting the increased rate in crime among those out on bond).

[137] *See* Comprehensive Crime Control Act of 1984, 18 U.S.C. §§ 3141–50.

pretrial release based on the defendants' flight risk or potential danger to the community.[138] If a judge determines that no condition would ensure either the accused's presence at trial or the safety of the community, the Act then allows judges to detain the accused without bail.[139] Thus, the 1984 Bail Reform Act shifted the focus of pretrial detention *away* from the concern of undermining the presumption of innocence and *towards* the use of pretrial detention as a means of regulating the safety of the community.[140]

4. Paid in Full: The Supreme Court Takes on Bail, Part II

The Bail Reform Act of 1984 brought change to America's bail system.[141] Public safety and the well-being of the community became the linchpin of an accused's pretrial bail determination, as bail proceedings focused almost exclusively on the accused's future danger to the community.[142] As one scholar notes, the last Supreme Court case to deal with the right to bail, *United States v. Salerno*,[143] ended the hope of invalidating the 1984 Bail Reform Act.[144] This occurred when the Supreme Court, with Chief Justice William

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[138] *See generally* Bail Reform Act of 1984, 18 U.S.C. § 3142(b) ("The judicial officer shall order the pretrial release of the [accused] . . . unless the judicial officer determines that such release . . . will endanger the safety of any other person or the community."); *see also* Appleman, *supra* note 12, at 1331.

[139] 18 U.S.C. § 31483142(e).

[140] *See* Appleman, *supra* note 12, at 1333–35 (holding that the Bail Reform Act of 1984 and the Supreme Court's decision in Salerno "struck a blow to concepts of retributive criminal justice [,]" which is predicated on the belief that a person can only be punished for a crime the person has committed (citing United States v. Salerno, 481 U.S. 739 (1987))).

[141] *See supra* Section I.C.3.

[142] *See id.* at 1330 ("The [Bail Reform Act of 1984] was predicated on protection of the public and community safety, making this factor one of the most critical in the determination of whether to release or detain defendants before trial.").

[143] 481 U.S. 739, 739 (1987).

[144] *See* Hegreness, *supra* note 70, at 959. *But see* Appleman, *supra* note 12, at 1349 (arguing that the Salerno decision, while rejecting facial challenges to the 1984 Bail Reform Act, still leaves open the possibility for as-applied challenges to Act).

Rehnquist writing for the majority,[145] upheld the constitutionality of the 1984 Bail Reform Act.[146]

In *Salerno*, two defendants were arrested and charged with racketeering and other crimes stemming from their alleged involvement in one of New York's organized crime families.[147] The government argued that because no reasonable condition of the defendants' pretrial release could ensure the community's safety, the defendants' bail should be withheld.[148] Ultimately, the Supreme Court agreed, holding that the 1984 Bail Reform Act adequately addressed the growing public concern that pretrial defendants out on bail pending trial were dangerous and more likely to commit new crimes while on bail.[149] The Court recognized that pretrial detention serves the compelling government interest of protecting the safety and welfare of the community.[150] Further, the Court rejected the defendants' Eighth Amendment challenges, reaffirming principles from *Carlson v. Landon*—that the Eighth Amendment does not

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[145] *See Salerno*, 481 U.S. at 739. Chief Justice Rehnquist served as Assistant Attorney General under President Nixon. *See* Hegreness, *supra* note 70, at 959. Hegreness notes, "the great victory in Nixon and [John] Mitchell's effort to destroy the right to bail came in 1987, when Chief Justice Rehnquist, who had been Mitchell's right-hand man as Assistant Attorney General[,] . . . wrote the majority opinion in Salerno." *Id.*

[146] *See Salerno*, 481 U.S. at 741.

[147] *Id.* at 743. Combined, the two defendants were charged with twenty-nine counts of racketeering, mail wire fraud, extortion, and gambling. *Id.* The government sought to prove that Defendant Salerno was the boss of the Genovese crime family and that Defendant Cafaro was a captain in the same crime family, thereby presenting a danger to the community. *Id.*

[148] *Id.* The government offered evidence of wiretaps implicating the defendants in various conspiracies and produced two witnesses testifying as to the defendants' involvement in numerous murder conspiracies. *Id.*

[149] *Id.* at 746–47 (determining that rising rate of crime committed by those on pretrial release was "a pressing societal problem" wherein the 1984 Bail Reform Act could be a "potential solution").

[150] *Id.* at 746–52. The Court held that "when Congress has mandated detention on the basis of a compelling interest other than prevention of flight . . . the Eighth Amendment does not require release on bail." *Id.* at 754–55.

bestow an absolute right to bail, but rather prohibits excessive bail from being imposed.[151]

After the *Salerno* decision, courts shifted focus in bail determinations from defendants' communal ties and likelihood of appearing at trial[152] to the defendants' potential danger to the community if released.[153] As Justice Marshall argued in his dissent in *Salerno*, this shift exhibits the deterioration of the presumption of innocence in pretrial proceedings.[154] The tension that the Supreme Court decisions on bail, the Bail Reform Projects, and the Bail Reform Acts created has spilled over to and caused conflict among the states.[155] The inconsistency with bail has also led to differing views amongst the states with respect to cash-only bail.[156]

II. MONEY, CASH, WOES: CASH-ONLY BAIL AND MONEY BAIL AMONGST THE STATES

Judges may consider a number of different factors when setting bail; however, none are more important in the eyes of state legislatures than ensuring defendants' appearance in court and

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[151] *See id.* at 754–55; *see also* Carlson v. Landon, 342 U.S. 524, 545 (1952) (holding that the excessive bail clause provides that bail shall not be excessive rather than an absolute right to bail). The Court in Salerno also expressly rejected the Stack Court's use of the Excessive Bail Clause to provide a right to bail for all defendants, indicating:

"The Court in Stack had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail, because the statute before the Court in that case in fact allowed the defendants to be bailed. Thus, the Court had to determine only whether bail, admittedly available in that case, was excessive if set at a sum greater than that necessary to ensure the arrestees' presence at trial." *Salerno*, 481 U.S. at 753.

[152] *See supra* Sections I.C.1–2.

[153] *See supra* Sections I.C.3–4.

[154] *See Salerno*, 481 U.S. at 763 (Marshall, J., dissenting) ("[A]t the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.").

[155] *See infra* Part II.

[156] *See infra* Part II.

potential danger to the community.[157] Although cash bail is the most frequently used method of bail,[158] courts rarely give weight to a defendant's financial resources and ability to post bail.[159] Instead, judges use their discretion to set extraordinarily high bail amounts that are nonetheless reasonable based on "bail schedules" and the seriousness of the crime charged.[160] A recent trend is for judges to impose a cash-only bail, which requires defendants to post the entire bond amount in cash to the court, without using any other security, surety, or discounted amount.[161] Rather than individualizing the process to determine an accused's flight risk,[162] courts often only review the charged offense and set a specific cash-only bail amount based off that charge.[163]

Moreover, because there is no explicit right to bail in the federal constitution,[164] courts reviewing cash-only bail challenges treat such challenges as solely a state constitutional issue.[165] When reviewing cash-only bail challenges, courts interpret their states' sufficient sureties clauses—also known as the Consensus Right to Bail Clause[166]—which provides that all persons accused of non-

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[157] *See* Lester, *supra* note 31, at 3.
[158] *See* Wice, *supra* note 48, at 10.
[159] *See id.* at 25–26.
[160] *See* Lester, *supra* note 31 at 26–28.
[161] *See* State v. Brooks, 604 N.W.2d at 346 n.1 (Minn. 2000) (en banc) (referring to cash-only bail as judges setting a monetary bail amount satisfied only by defendants posting the full amount set by the court).
[162] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 975–77 (advocating for the use of individualized bail determinations that consider an accused's communal ties and financial resources).
[163] *See infra* Section II.A.
[164] *See* Foote, *Constitutional Crisis in Bail*, *supra* note 77, at 969–89 (noting no explicit right to bail in the federal constitution); *see also* Fragoso v. Fell, 111 P.3d 1027, 1030 (Ariz. Ct. App. 2005) ("The United States Constitution is not implicated; although the Eight Amendment protects against excessive bail, 'there is no federal constitutional right to bail.'" (quoting Rendel v. Mummert, 474 P.2d 824, 826–27 (1970))).
[165] *See* State v. Barton, 331 P.3d 50, 55 (Wash. 2014) ("Because the federal constitution contains no clause requiring that defendants be bailable by sufficient sureties, this is purely a question of state constitutional law.").
[166] *See infra* Section II.B.

capital offenses are entitled to bail by *sufficient sureties*.[167] Courts, when deciding the constitutionality of cash-only bail, analyze the text, history, intent of the framers, and purpose of their states' Consensus Right to Bail Clause to determine whether cash-only bail serves as a sufficient surety.[168]

A. Money Affiliated: Factors that State Court Judges Analyze When Setting Bail

Generally, when judges set bail, they must keep in mind the goals of bail, including (1) the defendant's appearance in court;[169] (2) the safety of the community;[170] and (3) the defendant's liberty interest before conviction.[171] Also, to ensure an impartial and holistic bail determination, judges consider various factors and balance them with the aforementioned goals.[172] Despite a plethora of factors and circumstances available to judges when setting bail,[173] most courts consider four factors in particular: (1) the accused's criminal history; (2) the accused's reputation within, and dangerousness to, the community; (3) the accused's ties to the community, including

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[167] *See* Hegreness, *supra* note 70, at 923 (indicating the most common language of the clause reads: "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great").
[168] *See infra* Sections II.C.1–2.
[169] *See* Schnacke, *supra* note 13, at 14.
[170] *See* Appleman, *supra* note 12, at 1330.
[171] *See* Lester, *supra* note 31, at 3.
[172] *See* State v. Gutierrez,) 140 P.3d 1106, 1109 (N.M.2006) (holding that in determining bail, the court must "balance the defendant's interest in pretrial release with the State's interest in securing the defendant's appearance at trial and the interest in safeguarding the community from any potential threat").
[173] *See* Lester, *supra* note 31, at 55. These other factors in setting bail include: (1) the accused's history of appearing in court; (2) the accused's ability to make bail; (3) the accused's funds used to make bail and financial resources; (4) the probability of committing a crime if released; (5) protecting the public or preventing danger to society; (6) the weight of evidence against the accused; (7) the accused's flight risk; (8) whether reasonable restrictions could be placed on the accused in allowing pretrial release; (9) whether the accused accrued new charges while on pretrial release; and (10) prosecutors' or pretrial services' recommendations. *See id.*; *see also* Weiss, *supra* note 26.

employment, family, and property; and (4) the nature of the charged offense.[174] Some states inquire into the defendant's financial *resources*, but few actually inquire into a defendant's *ability* to post bail.[175]

In addition, state courts often use bail schedules to guide their decisions.[176] Bail schedules are predetermined bail amounts based on the accused's charges.[177] Bail schedules seek to standardize the bail-setting process, provide guidance to judiciaries, and increase efficiency.[178] However, these predetermined bail amounts often vary by county and provide judges with little-to-no guidance on an accused's dangerousness or likelihood of appearing in court.[179] Furthermore, the bail schedule amounts often become the defendant's actual bail amount,[180] leaving no room for individualized bail proceedings or judicial discretion.[181] Even if judges do

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[174] *See id.* at 24; *see also Bail: An Ancient Practice Reexamined*, *supra* note 124, at 974 (noting that bail is often set based on the offense because the greater the punishment the defendant faces, the more incentive he has to flee).

[175] *See* Lester, *supra* note 31, at 25 (citing Georgia, Illinois, Kentucky, Louisiana, Nevada, Texas, Virginia, and West Virginia as those states that "inquire specifically into the defendant's ability to pay a bond if set"); *see also* Wice, *supra* note 48, at 14 ("One of the most ironic aspects of the bail-setting procedure is that the factor explored least frequently by the judge has the greatest impact on the defendant's ability to secure pretrial release—his financial status and the amount of bail he can afford to pay.").

[176] *See* Lindsey Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, 26 CRIM. JUST. 12, 13 (2011). Bail schedules are defined as "procedural schemes that provide judges with standardized money bail amounts based upon the offense charged, regardless of the characteristics of an individual defendant." *Id.*

[177] *See id.* at 13–14 (noting that many jurisdictions have fixed money bail schedules that are predetermined based on the defendant's highest charge); *see also* Wiseman, *supra* note 15, at 1360 (describing that bail is "largely determined by fixed bail schedules, which . . . often forces indigent defendants and their families to spend money that otherwise would have covered basic necessities").

[178] *See* Neil, *supra* note 9, at 22–23 (describing bail schedules as an arbitrary attempt to standardize bail proceedings based on the crime charged).

[179] *See* Neil, *supra* note 9; *see also* Carlson, *supra* note 176, at 16–17 ("To the extent that bail schedules encourage judges to surrender their ability to impose such discretionary conditions, [bails schedules] run completely contrary to public safety interests.").

[180] *See* Lester, *supra* note 31, at 25–26.

[181] *See* Neil, *supra* note 9, at 23 ("Another concern for bail schedules is that, if they are required to be used, judicial discretion in the bail setting is limited."); *see*

not use bail schedules, outside pressures such as newspapers, media outlets, politics, and the community as a whole may cause judges to stay away from pretrial release, fearing adverse public opinion or disapproval if they release defendants who end up committing new crimes.[182]

B. Universal Language: The Consensus Right to Bail Clause Among the States

Just as United States citizens have certain bail protections from the federal government,[183] states have protected their citizens with what has been collectively known as the Consensus Right to Bail Clause.[184] In 1682, Pennsylvania was the first state to draft the Consensus Right to Bail Clause.[185] The most common phrasing of the Clause reads, "All persons shall be bailable by *sufficient sure-*

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also Bail: An Ancient Practice Reexamined, *supra* note 124, at 974 (arguing that the offense should not be the only determinant in setting bail, as courts should consider the defendant's community reputation and ties, past criminal record, and the defendant's likelihood of guilt). The American Bar Association has rejected the use of bail schedules and has declared that "[b]ail schedules are arbitrary and inflexible [. Bail schedules] exclude consideration of factors other than the charge that may be far more relevant to the likelihood that the defendant will appear for court dates." *See* Standards for Criminal Justice: Pretrial Release § 10-5.3(e) cmt. at 113, AM. BAR ASS'N (2007), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf [hereinafter Standards].

[182] *See* Wice, *supra* note 48, at 15, 25 (noting that "pressures exerted on the judiciary by the press and general public influence the bail-setting decision" and publicity from the mass media may cause judiciaries to "adopt[] a very cautious position on pretrial release"); *see also* Lester, *supra* note 31, at 44 ("When faced with the political backlash of letting a 'dangerous' suspect back out on the street, what judicial officer would not be biased towards detention?").

[183] *See* Schnacke, *supra* note 13, at 5 (indicating three distinct features surrounding bail in America after the Eighth Amendment and Judiciary Act of 1789, including bail as a means of assuring the accused's presence at trial, a right to bail in non-capital cases, and a right against excessive bail).

[184] *See* Hegreness, *supra* note 70, at 923.

[185] *See id.* at 920 (describing Pennsylvania's bail scheme as "the true prototype for the Consensus Right to Bail Clause [that would be] enshrined in the majority of state constitutions").

ties, except for capital offenses when the proof is evident or the presumption great."[186] Forty-two of the fifty states have adopted this Clause within their state constitutions,[187] while another six states have protected the right to bail by statute.[188] However, with the federal decline in bail rights in the 1970s and 1980s,[189] states began to follow the federal model and consider bail based on defendants' danger to the community or pretrial flight risk.[190] Nevertheless, today, forty-eight states have protected this Consensus Right to Bail either statutorily or constitutionally.[191]

C. Money, Power, Respect: Cash-Only Bail and Its Constitutionality Among the States

With the majority of states providing a right to bail through their state constitutions or statutes, the question of whether cash-only bail is a "sufficient surety" within the meaning of the Consensus Right to Bail Clause has provided a split among state courts.[192] Eight states have ruled that cash-only bail is constitutional, while seven states have ruled that cash-only bail is unconstitutional.[193] The remaining thirty-four states have either not yet been presented with an opportunity to rule on the issue, or have declined to rule on the issue directly.[194] The substantial-public-interest exception has allowed courts to hear such challenges notwithstanding the moot-

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[186] *Id.* at 920, 923.
[187] *See id.* at 921–23. Georgia, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Virginia, and West Virginia are the eight states that have not provided a Consensus Right to Bail Clause in their constitutions. *See id.* at 969–96.
[188] *See id.* at 949 (explaining that the Consensus Right to Bail was given constitutional and statutory protection in forty-eight of the fifty states).
[189] *See supra* Sections I.C.3–4.
[190] *See* Hegreness, *supra* note 70, at 962 ("[M]ost [states] followed the Bail Reform Act [of 1984] and made it lawful to deny bail to persons who courts find pose a danger to the community or are likely to flee.").
[191] *See id.* at 969–96 (providing tables with each states' constitutions over the course of history and their modification of the Consensus Right to Bail Clause).
[192] *See id.* at 940 ("Courts have recently split over whether the Right to Bail Clause in their state constitutions prohibits cash-only bail.").
[193] *See infra* Sections II.C.1–2.
[194] *See infra* Section II.C.3.

ness doctrine[195] and subsequent events in an accused's criminal prosecution.[196] In determining the constitutionality of cash-only bail, courts have utilized canons of interpretation to determine whether cash-only bail constitutes a sufficient surety.[197] Although indigent defendants have raised Equal Protection claims, arguing that cash-only bail violates equal protection under the law, some courts continue to treat the issue as strictly a matter of interpretation.[198]

1. Put Your Money Where Your Mouth Is: States Ruling Cash-Only Bail Constitutional

Eight states—Alabama,[199] Arizona,[200] Arkansas,[201] Colorado,[202] Iowa,[203] Missouri,[204] New Mexico,[205] and Wyoming[206]—have

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[195] *Mootness Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The principle that American courts will not decide moot cases—that is, cases in which there is no longer any actual controversy.").

[196] *See, e.g.*, Trujillo v. State, 483 S.W.3d 801, 804 (Ark. 2016) ("Because the imposition of 'cash only' bail affects all criminal defendants seeking pretrial release, the public, our judiciary and members of the bar, it falls within the purview of the exception to the mootness doctrine as an issue of substantial public interest."); *see also* State v. Brooks, 604 N.W.2d 345, 348 (Minn. 2000) (en banc) (noting that failing to decide the constitutionality of cash-only bail "could have a continuing adverse impact on those defendants who are unable to post a cash only bail").

[197] *See, e.g.*, *Trujillo*, 483 S.W.3d at 806 (interpreting the meaning of the sufficient sureties clause through its *ordinary meaning* and dictionary definition); State v. Briggs, 666 N.W.2d 573, 582 (Iowa 2003) (looking to the *intent of the framers* of Iowa's state constitution to determine the meaning of sufficient sureties); State v. Gutierrez, 140 P.3d 1106, 1111 (N.M. 2006) (analyzing what the *purpose* of bail is to interpret whether cash-only bail is a sufficient surety).

[198] *See* Neil, *supra* note 9, at 15–16 ("Current practices allow for people to be treated differently within the criminal justice system on account of their financial status [which] is believed to be a violation of the Equal Protection Clause."); *see also O'Donnell v. Harris Cty*, 2018 WL 851776, at *10 (Feb. 14, 2018) ("[T]he incarceration of those who cannot pay money bail, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements.").

[199] *See* Williams v. City of Montgomery, 739 So. 2d 515 (Ala. Crim. App. 1999).

[200] *See* Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005).

held that cash-only bail constitutes a sufficient surety. Among other things, these courts have looked to the history of their constitutions to uncover the meaning of "sufficient sureties."[207] For example, in *Fragoso v. Fell*,[208] police charged the defendant as a co-conspirator in a conspiracy to sell marijuana.[209] The trial judge set bond at "$50,000 cash" and denied the defendant's request to put up $50,000 worth of real estate in lieu of the cash amount.[210] In response to the defendant's argument that Arizona law does not explicitly authorize cash-only bail, the Arizona Court of Appeals held that cash-only bail constituted a sufficient surety.[211] The court reasoned that America's expanding frontier and rural areas made cash the only conceivable means of ensuring the defendant's appearance at trial.[212] Thus, the court determined that, at the time Arizona adopted its Consensus Right to Bail Clause, Arizona's constitutional framers intended to permit cash-only bail.[213]

In addition to history, courts have looked to the textual meaning of the sufficient sureties language to determine cash-only bail's constitutionality. For example, in *State v. Briggs*,[214] the district court imposed a $6,500 cash-only bond for the defendant jump-

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[201] *See Trujillo*, 483 S.W.3d at 801.
[202] *See* Fullerton v. Cty. Court, 124 P.3d 866 (Colo. App. 2005).
[203] *See* State v. Briggs, 666 N.W.2d 573 (Iowa 2003).
[204] *See* State v. Jackson, 384 S.W.3d 208 (Mo. 2012).
[205] *See* State v. Gutierrez, 140 P.3d 1106 (N.M.2006)
[206] *See* Saunders v. Hornecker, 344 P.3d 771 (Wyo. 2015).
[207] *See id.* at 778–79 (explaining that Wyoming and other courts to be confronted with the issue of whether cash-only bail is constitutional have looked to the meaning of the "sufficient sureties" and interpreting the clause either broadly or narrowly).
[208] *See Fragoso*, 111 P.3d at 1027 (Ariz. Ct. App. 2005).
[209] *Id.* at 1029.
[210] *Id.* The trial judge initially set bail at $250,000, but lowered the amount to $50,000 cash-only. *Id.*
[211] *Id.* at 1031–34.
[212] *Id.* at 1032–33.
[213] *See id.* at 1033 ("We have no basis for concluding that the drafters of our constitution intended to foreclose a cash-only restriction as one of the conditions by which [assuring the defendant's presence at trial] could be attained.").
[214] *See Briggs*, 666 N.W.2d at 573 (Iowa 2003).

ing bail on a prostitution charge.[215] In holding cash-only bail constitutional, the Iowa Supreme Court determined that Iowa's constitutional framers used the sufficient sureties language to create access to a surety in some form; however, the framers did not intend to give individuals unlimited access to any surety.[216] The court held that the framers qualified "surety" with "sufficient" to give judges discretion within the bail-setting process, and cash-only bail is within the purview of that discretion.[217]

These courts have also held that the purpose of each state's Consensus Right to Bail Clause should be interpreted broadly when analyzing the constitutionality of cash-only bail.[218] For example, in *Saunders v. Hornecker*[219]—in which two of three defendants were unable to post their initial cash bonds of $500 and $2,000[220]—the Wyoming Supreme Court determined that because the purpose of bail was to ensure the accused's presence at trial, the sufficient sureties clause should be interpreted broadly so as to allow for

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[215] *Id.* at 574–75.

[216] *See id.* at 582 (holding that the framer's use of historical lineage to draft the sufficient surety language "was a clear creation of a right to access a surety of some form [, but] . . . d[id] not indicate that the framers intended that a person should be bailable by *any* surety without limit") (emphasis in original).

[217] *See id.* at 582 ("By including this ["sufficient"] qualification for a surety, the framers carved out a measure of discretion for the person overseeing the bailing process.").

[218] *See, e.g.*, Saunders v. Hornecker, 344 P.3d 771, 780–81 (Wyo. 2015) (holding that the purpose and language of the words "sufficient surety" allows for cash-only bail as a broad, constitutionally permissible means for ensuring the defendant's presence at trial).

[219] *Id.* at 771.

[220] *Id.* at 773–74. Three defendants—Amos, Dwyer, and Saunders—had their cases consolidated because each defendant challenged the imposition of their cash-only bonds. *Id.* The trial judge set Defendant Amos's bond at $2,000 cash-only based on charges of interfering with a peace officer and carrying a concealed weapon. *Id.* at 774. Defendant Dwyer failed to appear in court for an earlier charge of failing to maintain liability coverage and his bond was set at $500 cash-only. *Id.* Notably, Dwyer plead guilty and the trial judge sentenced him to 23 days in jail, which was equivalent to the time Dwyer already served in jail before his plea. *Id.* Saunders, on the other hand, received a $100,000 cash bail after being arrested on a warrant for aggravated assault. *Id.*

judges to impose cash-only bail.[221] Similarly, the Arkansas Supreme Court in *Trujillo v. State*,[222] defined a sufficient surety as "an adequate guarantee to ensure the accused's presence at trial."[223] Because cash is one of many broad methods to ensure such appearance, the court in *Trujillo* held that cash-only bail constitutes a sufficient surety.[224] Unlike the defendants in *Saunders*, however, Trujillo's charges appeared much more serious, as police charged Trujillo with assault and battery on his pregnant girlfriend and her son.[225] Therefore, these courts also impose cash-only bond where the alleged crime is severe.[226]

Like Arkansas, New Mexico has also considered the severity of the crime and the safety of the community in analyzing cash-only bail claims.[227] In *State v. Gutierrez*,[228] for example, the defendant was indicted on multiple counts of murder and manslaughter, and the trial court set bond at $300,000 cash-only.[229] The New Mexico Supreme Court upheld cash-only bail as a constitutionally permissible means of ensuring the safety of the community.[230] While defendants have an interest in pretrial release, the court held that this interest should be balanced against the State's ultimate goals of

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[221] *Id.* at 780–81.
[222] *See Trujillo*, 483 S.W.3d at 801 (Ark. 2016).
[223] *See id.* at 806.
[224] *See id.* ("[B]ased on the plain language of the constitution and our stated purpose for bail, we hold that the term 'sufficient sureties' refers to a broad range of methods to accomplish 'sufficient sureties,' including cash.").
[225] *Id.* at 802. Two of the three defendants in Saunders, 344 P.3d at 774, were charged with relatively minor charges, whereas the defendant in Trujillo, 483 S.W.3d at 802, hit his thirty-five-week pregnant girlfriend and her son, attempted to smother the son, bound his girlfriend, and dunked her under bathtub water. Initially, Trujillo posted a $25,000 cash or surety bond and was released. Trujillo, 483 S.W.3d at 802. However, after violating a no-contact order, the prosecutor motioned for Trujillo's bail to be revoked. *Id.* At a bail hearing, the trial court set Trujillo's bail at $300,000 cash-only. *Id.* at 803.
[226] *See, e.g.*, *Trujillo*, 483 S.W.3d at 802; *see also* State v. Gutierrez, 140 P.3d 1106 (N.M.2006).
[227] *See Gutierrez*, 140 P.3d at 1111.
[228] *Id.* at 1106.
[229] *Id.* at 1107.
[230] *Id.* at 1110–16.

securing the safety of the community and ensuring the defendant's future appearance in court.[231] The court reasoned that a recognizance bond or any other less restrictive alternative—such as electronic monitoring—could not adequately ensure the community's safety or Gutierrez's future presence in court.[232] Nonetheless, the court in *Gutierrez* cautioned trial judges who impose cash-only bonds, indicating that courts should impose the least onerous conditions first and then use cash-only bail as a last resort.[233]

In addition to using interpretative canons and other justifications to uphold cash-only bail as constitutional, these courts have noted the similarities and differences between sufficient sureties challenges and excessive bail challenges.[234] For example, the Iowa Supreme Court in *Briggs*[235] ruled that the right to bail by sufficient sureties and the right against excessive bail work together to secure community safety, ensure defendants' appearance at trial, and protect defendants against abusive bail practices.[236] In *State v. Jackson*,[237] however, the Missouri Supreme Court held that because the only purpose of bail is to secure the defendant's appearance at

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[231] *See id.* at 161 ("We believe the better approach is to balance the defendant's interest in pretrial release with the State's interest in securing the defendant's appearance at trial and the interest in safeguarding the community from any potential threats.").

[232] *See id.*

[233] *See id.* at 162 ("[W]e caution trial judges to follow the directives of the rule in exercising their discretion to set conditions of release. The types of secured bonds authorized are enumerated in the order of priority in which they are to be considered, with the least onerous conditions listed first. Cash-only bail is the last option and should only be imposed after careful consideration.").

[234] *See, e.g.*, State v. Briggs, 666 N.W.2d 573, 583–84 (Iowa 2003) ("[I]t is conceivable that the use of cash-only bail could violate the excessive bail clause even though its use does not automatically violate the sufficient sureties' clause."); State v. Jackson, 384 S.W.3d 208, 216 (Mo. 2012) (en banc) (noting that the misuse of cash-only bail as a means to keep defendants in jail is not addressed by Missouri's sufficient sureties' clause, but rather addressed by Missouri's excessive bail clause).

[235] 666 N.W.2d at 573.

[236] *See id.* at 583–84 ("[T]he excessive bail clause works with the sufficient sureties' clause to protect the interests of the prisoner in the interrelationship between the state, the prisoner, and the surety.").

[237] 384 S.W.3d at 208.

trial, any bail set that is more than necessary to secure that appearance is excessive; thus, the excessive bail clause addresses judges' misuse of cash-only bail, not the sufficient sureties clause.[238]

The court in *Jackson* further determined that a challenge to cash-only bail based on the defendant's inability to pay bail is a concern with the amount of bail set—that being bail's excessiveness—and not the form in which bail was set—that being bail's sufficiency as a surety.[239] Thus, while courts have conceded that the excessive bail clause and sufficient sureties' clause may work in conjunction with each other,[240] a defendant's inability to post bail does not render bail excessive.[241] Nor does cash-only bail automatically violate the sufficient sureties clause if cash-only bail is found to violate the excessive bail clause.[242] However, the court in *Jackson* determined that setting bail higher than necessary to ensure the defendant's appearance at trial runs contrary to the presumption of innocence.[243] The presumption of innocence has laid the foundation for a handful of states to differ from these eight states and find cash-only bail unconstitutional.[244]

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[238] *See id.* at 216.

[239] *See id.* at 216 (explaining that challenges to cash-only bail based on the defendant's inability to post bail are "a concern with the *amount* of bail, not with the *form* of bail permitted").

[240] *See Briggs*, 666 N.W.2d at 583–84; *see also* Hornecker, 344 P.3d 771, 781 (Wyo. 2015) (holding that the sufficient sureties' clause allows for a broad range of methods to ensure the defendant's presence at trial, including cash-only bail, and those methods are determined at the discretion of the trial court and subject to the prohibition against excessive bail).

[241] *See Jackson*, 384 S.W.3d at 217 ("'Bail is not excessive merely because a defendant is unable to secure it.'" (quoting Dabbs v. State, 489 S.W.2d 745, 748 (Mo. App. 1972))); *see also* Foote, *Constitutional Crisis in Bail*, *supra* note 77, at 993 ("[A] mere inability to procure bail in a certain amount does not of itself make such amount excessive.").

[242] *See Briggs*, 666 N.W.2d at 584 ("[I]t is conceivable that the use of cash-only bail could violate the excessive bail clause even though its use does not automatically violate the sufficient sureties clause.").

[243] *See Jackson*, 384 S.W.3d at 216 ("bail set higher than necessary to secure the defendant's appearance or to protect the public [] constitutes an impermissible punishment, contrary to the venerable presumption that a defendant is innocent until proven guilty").

[244] *See infra* Section II.C.2.

2. Money is the Problem: States Ruling Cash-Only Bail Unconstitutional

Contrary to the eight states upholding the constitutionality of cash-only bail,[245] Idaho,[246] Louisiana,[247] Minnesota,[248] Ohio,[249] Tennessee,[250] Vermont,[251] and Washington[252] have held that cash-only bail is not a sufficient surety and, thus, violates the Consensus Right to Bail Clause. These courts have held that cash-only bail operates as an effective denial of bail.[253] For example, in *Lewis Bail Bond Co. v. Gen. Sessions Court*,[254] the Tennessee Court of Appeals criticized the imposition of cash-only bail by analogizing to a judge imposing a real-estate-only bond.[255] The *Lewis* court held that requiring a defendant to put up only real estate—a luxury not all defendants have—in order to obtain pretrial release would violate the Consensus Right to Bail Clause.[256] The court in *Lewis* reasoned that defendants with no real estate—like those with no cash—are effectively denied a sufficient surety when they are required to post a real-estate-only or cash-only bond.[257] Similarly, in *State ex rel.*

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[245] *See supra* Section II.C.1.

[246] *See* Idaho Code § 19-2907(2) (2009) ("Although bail may be posited in the form of a cash deposit [,] . . . a defendant shall not be required to post bail in the form of a cash deposit."); *see also* Two Jinn, Inc. v. Dist. Court of the Fourth Judicial Dist., 249 P.3d 840, 847 (Idaho 2011) (noting that Idaho's Constitution and Bail Act prohibits cash-only bail prior to conviction for noncapital offenses).

[247] *See* State v. Golden, 546 So. 2d 501, 503 (La. Ct. App. 1989).

[248] *See* State v. Brooks, 604 N.W.2d 345, 352–53 (Minn. 2000) (en banc).

[249] *See* State ex rel. Sylvester v. Neal, 14 N.E.3d 1024, 1032 (Ohio 2014).

[250] *See* Lewis Bail Bond Co. v. Gen. Sessions Court, No. C-97-62, 1997 WL 711137, at *1, *4–5 (Tenn. Ct. App. Nov. 12, 1997).

[251] *See* State v. Hance, 910 A.2d 874, 881 (Vt. 2006).

[252] *See* State v. Barton, 331 P.3d 50, 55 (Wash. 2014).

[253] *See, e.g.*, Lewis, 1997 WL 711137, at *5; *Hance*, 910 A.2d at 881 ("[T]he imposition of cash only bail is, in effect, a denial of bail under circumstances that are not constitutionally permissible.").

[254] *Lewis*, 1997 WL 711137, at *1.

[255] *See id.* at *5.

[256] *See id.*

[257] *See id.*

Sylvester v. Neal,[258] the Ohio Supreme Court acknowledged that cash-only bail operated as an effective denial of bail, pointing out the problem that only wealthy defendants would obtain pretrial release, while the indigent would remain incarcerated.[259]

Further, these states have interpreted the plain language of "sufficient sureties" differently than those states allowing for cash-only bail.[260] For example, in *State v. Barton*,[261] the Washington Supreme Court ruled that the Consensus Right to Bail Clause requires courts to allow the defendant, at minimum, an opportunity to post a surety bond in addition to any cash requirements.[262] The court reasoned that because the history surrounding bail indicated that suretyship evolved out of third-party arrangements, access to a "surety" in the context of the Consensus Right to Bail Clause requires access to a third-party surety.[263] The court qualified its holding, however, noting that judges are not required to give defendants an absolute right to make bail; instead, defendants must only be given an *opportunity* to post bail using a surety.[264]

In addition, court's ruling that cash-only bail is unconstitutional have determined that the history of bail suggests bail's primary purpose is to protect defendants, not simply secure their

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[258] 14 N.E.3d 1024 (Ohio 2014).

[259] *Id.* at 1033 ("When a court sets [cash-only] bail [. . .] and does not allow the defendant to secure a surety bond as an alternative, it denies the constitutional right of the defendant to be bailable by sufficient sureties.").

[260] *Compare* State v. Barton, 331 P.3d 50, 55 (Wash. 2014) (en banc) (finding that judges must allow defendants an opportunity to post a surety bond in addition to cash), *with* Trujillo v. State, 483 S.W.3d 801, 806 (Ark. 2016) (finding that cash is one of many broad methods to ensure a defendant's appearance at trial and is, therefore, a sufficient surety).

[261] 181 Wash. 2d at 148.

[262] *See id.* at 162.

[263] *See id.* at 162 ("Focusing on the plain language of [the sufficient sureties' clause] and reviewing the historical understanding of a surety at the time this language was adopted, we conclude . . . that a defendant must be allowed the option of a surety arrangement in addition to the option of depositing cash or property.").

[264] *See id.*

appearance at trial.[265] For example, in *State v. Hance*,[266] the Vermont Supreme Court engaged in a historical analysis, finding that bail both furthers defendants' liberty interests and ensures their presence at future court proceedings.[267] While history recognized both interests, the court in *Hance* held that the sufficient sureties' clause primarily protects defendants' liberty interests and secondarily serves courts' interests in ensuring defendants' appearance at trial.[268] Further, because cash-only bail has the effect of detaining the accused before conviction—thereby depriving defendants of their freedom before conviction—the court in *Hance* held that cash-only bail not only violates the sufficient sureties clause, but also undermines the presumption of innocence.[269] The Idaho Supreme Court similarly reasoned that cash-only bail fails to protect the accused from punishment before conviction.[270]

While these courts have acknowledged the competing purposes of bail—preserving the defendant's liberty interest before trial versus ensuring the defendant's appearance at trial and communal safety[271]—these courts have also determined that there can be

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[265] *See* State v. Hance, 910 A.2d 874, 878 (Vt. 2006) ("[H]istory indicates that constitutional bail provisions . . . serve not only to ensure a defendant's future appearance, but also to protect the defendant from pretrial detention by providing a measure of flexibility in satisfying the court that he will appear as required.").

[266] 910 A.2d at 874.

[267] *See id.* at 879 (noting that bail "'acts as a reconciling mechanism to accommodate both the defendant's interest in pretrial liberty and society's interest in ensuring the defendant's presence at trial.'" (quoting Donald B. Verrilli, Jr., *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328, 329–30 (1982))).

[268] *See Hance*, 910 A.2d at 879 (describing the history of the sufficient sureties clause as "*primarily*" aimed at protecting a defendant's liberty interest and, concomitantly, serving the court's interest in having the defendant appear at trial") (emphasis added).

[269] *See id.* at 879.

[270] *See* Two Jinn, Inc. v. Dist. Court of the Fourth Judicial Dist., 249 P.3d 840, 847 (Idaho 2011) ("The purpose of bail is to prevent the punishment of innocent persons and at the same time compel the presence of the prisoner when required.").

[271] *See supra* Section II.A; Section II.C.1.

more than one purpose behind state constitutional provisions.[272] For example, the Minnesota Supreme Court in *State v. Brooks*[273] acknowledged bail as having multiple purposes.[274] However, like the Vermont Supreme Court in *Hance*, the court in *Brooks* determined that bail serves the broader purpose of limiting the government's power over the accused, as it provides protection for the accused's liberty interests against courts' interests in securing defendants' presence in court.[275] Ultimately, these seven states have held that cash-only bail contradicts the sufficient sureties' language, the history of bail, the presumption of innocence, and the defendant's liberty interest in pretrial release.[276] Despite substantial case law on both sides of the issue, however, some states have declined to rule on cash-only bail's constitutionality as a sufficient surety.[277]

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[272] *See* State v. Barton, 331 P.3d 50, 55 (Wash. 2014) ("[T]here can be more than one purpose motivating a provision of the state constitution."); *see also* State v. Brooks, 604 N.W.2d 345, 350 (Minn. 2000) (en banc).

[273] 604 N.W.2d at 345.

[274] *See id.* at 350 (noting that bail ensures the accused's appearance at trial and protects the accused's liberty interests).

[275] *See id.* ("In essence, the clause limits government power to detain an accused prior to trial. The clause is intended to protect the accused rather than the courts."); *see also* State v. Hance, 910 A.2d 874, 878 (Vt. 2006) ("To construe the 'sufficient sureties' clause as permitting cash-only bail would increase government power to engage in pretrial confinement, a result which cannot be reconciled with . . . [as] we have recognized the threat to individual liberty inherent in pretrial detention."); State *ex rel* Jones v. Hendon, 609 N.E.2d 541, 544 (Ohio 1993) ("[T]he only apparent purpose in requiring 'cash only' bond to the exclusion of other forms of [bail] is to restrict the accused's access to a surety and, thus, to detain the accused in violation of [the sufficient sureties' clause.]").

[276] *Hance*, 910 A.2d at 878 ("Our interpretation of the 'sufficient' sureties' clause should be consistent with our longstanding recognition that bail cannot be used for the purpose of pretrial detention.").

[277] *See infra* Section II.C.3.

3. The Other Stacks on Deck: Other States Confronted with the Constitutionality of Cash-Only Bail

While a minority of states have addressed the constitutionality of cash-only bail in the sufficient surety context,[278] four states have either expressly declined the invitation to make a ruling or have ruled in such a way as to leave the constitutionality of cash-only bail undecided.[279] New York, for example, in *People ex rel. McManus v. Horn*,[280] prohibited cash-only bail by holding that judges could not fix only one form of bail because the linguistic construction of New York's Criminal Procedure Law required at least two forms of bail for defendants.[281] The *McManus* decision did not explicitly rule on the constitutionality of cash-only bail, and the decision adds little to cash-only bail's jurisprudence.[282] The Montana Supreme Court in *State v. Rodriguez*[283] also declined to decide whether cash-only bail is constitutional, rendering the issue

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[278] *See supra* Sections II.C.1–2 (finding that fifteen states have ruled directly as to whether cash-only bail constitutes a sufficient surety).

[279] *See* People *ex rel.* McManus v. Horn, 967 N.E.2d 671, 673(N.Y. 2012); State v. Rodriguez, 628 P.2d 280, 284(Mont. 1981); State v. Henley, 363 P.3d 319, 328 (Haw. 2015); Sneed v. State, 946 N.E.2d 1255 (Ind. Ct. App. 2011).

[280] 967 N.E.2d at 671.

[281] *See id.* at 665–66 ("The court may direct that the bail be posted in *any one of two or more of the forms* specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms.") (emphasis added) (citing N.Y. Crim. Proc. Law § 520.10(2)(b) (McKinney 2006)).

[282] *See Horn*, 967 N.E.2d at 673; *see also* Maureen Wynne, Note, McManus v. Horn: *The Legality of Setting a Single Form of Bail*, 29 TOURO L. REV. 1537, 1553–54 (2013) (suggesting that the McManus decision, by mandating that trial courts provide accused persons more than one form of bail, "can be just as restrictive as setting a single form of bail"). As Wynne indicates, under McManus, a trial court is required to set at least two forms of bail for the defendant. *See id.* at 1552. However, the trial court may impose a $20,000 cash bail or a $200,000 partially secured appearance bond, which would require the defendant to pay a 10% deposit totaling $20,000. *Id.* Thus, despite the McManus decision, Wynne asks, "whether a choice between two unattainable bail forms is really a choice at all [?]" *Id.* at 1554.

[283] 628 P.2d 280 (1981).

moot.[284] The court in *Rodriguez* noted, however, that cash-only bail may violate the defendant's liberty interest and the presumption of innocence.[285] Similarly, a Hawaii court noted the unfairness of imposing cash-only bail, but ultimately declined to hear the issue.[286]

Perhaps the closest decision to rule on cash-only bail without actually ruling as to its constitutionality is *Sneed v. State*, in which the Indiana Court of Appeals ruled that cash-only bail was impermissible, but on other grounds not relating to cash-only bail's constitutionality as a sufficient surety.[287] The *Sneed* court held that the trial court abused its discretion by requiring the defendant to post a $25,000 cash-only bail.[288] The court in *Sneed* reasoned that because the defendant (1) was unable to post the entire $25,000 in cash; (2) was denied a surety option; and (3) was not determined to be a flight risk, the trial court had condemned the defendant to jail without reason.[289] Ultimately, the court in *Sneed* held that the trial court abused its discretion in setting cash-only bail[290] without referring to the sufficient sureties language, despite Indiana having such language in its constitution.[291]

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[284] *See id.* at 284. While the Court did not precisely explain why the issue was rendered moot, it indicated that in the future, if a court sets a cash-bail, the court must make specific findings backing its decision.

[285] *See id.* (declining to rule on whether cash-only bail violates the sufficient sureties clause of Montana's state constitution, but finding that cash-only bail "may well deprive a person of his liberty before trial and clash with the presumption of innocence").

[286] State v. Henley, 363 P.3d 319, 329 (Haw. 2015) ("[T]his case highlights the unfairness in conditioning bail on payment in cash only."). The Hawaii Supreme Court denied hearing the issue of whether cash-only bail was constitutional because the defendant failed to raise the issue on appeal. *See id.*

[287] Sneed v. State, 946 N.E.2d 1255, 1260 (Ind. Ct. App. 2011).

[288] *Id.* at 1260. Sneed was charged with dealing methamphetamine. *Id.* at 1256. After the trial court denied both the defendant's motion to reduce bail and her request for a surety option, the defendant claimed that the set bail was excessive and that the trial court's bail effectively punished her before trial. *Id* at 1260.

[289] *Id* at 1260.

[290] *See id.* at 1256–61 (refusing to render cash-only bail unconstitutional).

[291] *See id.* at 1260; Ind. Const. art. I, § 17 ("Offenses, other than murder or treason, shall be bailable by sufficient sureties.").

Overall, eight states have concluded that cash-only bail constitutes a sufficient surety based on bail's history, its purpose, the intent of the framers, the severity of the offense, and public safety.[292] On the other hand, seven states have held cash-only bail violates states' sufficient sureties clauses, focusing on the defendant's liberty interests.[293] Notwithstanding these arguments, four states have declined to take sides on the direct issue,[294] perhaps waiting for scholars and various justice initiative groups to propose more cost-efficient and practical alternatives.[295]

D. Dreams Money Can Buy: Scholars and Justice Initiative Groups on Cash-Only Bail and Alternatives to the Money Bail System

Many scholars and justice initiative groups have pointed out flaws with the money bail system, attributing part of the problem to judges setting high cash bails—or cash-only bail amounts—that defendants are unable to meet, thereby resulting in incarceration.[296] America's leaders have even called for reform, pointing to the nine billion dollar bill taxpayers have fronted to incarcerate defendants before trial.[297] In light of the problems associated with the money bail system, bail scholars and justice initiative groups have proposed alternatives that neutralize the money bail system's effect on

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[292] *See supra* Section II.C.1.
[293] *See supra* Section II.C.2.
[294] *See* cases cited *supra* note 279.
[295] *See infra* Section II.D.
[296] *See* Appleman, *supra* note 12, at 1306 ("Judges often set money bail at an amount the defendant cannot afford."); Lester, *supra* note 31, at 20 ("A high bail should not be used as a method of pretrial detention."); Neil, *supra* note 9, at 13 ("[M]oney bail puts people without expendable income at risk of suffering the adverse impacts of detention."); Rabuy, *supra* note 8, at 1 ("With money bail, a defendant is required to pay a certain amount of money as pledged . . . [, and i]f he is unable to come up with the money[,] . . . he can be incarcerated from his arrest until his case is resolved or dismissed in court.").
[297] *See* Holder, *supra* note 16, at 2 ("[N]early two thirds of all inmates who crowd our county jails—at an annual cost of roughly nine billion taxpayer dollars—are defendants awaiting trial.").

indigent defendants, including electronic monitoring and recognizance bonds.[298] While these alternatives seem both practical and cost efficient, proponents of the money bail system contend that these alternatives are flawed.[299] Thus, some scholars have argued in favor of cash-only bail and have suggested that the money bail system serves bail's essential purpose—ensuring defendants' appearance at trial one way or another.[300]

1. Make It Rain (on the Poor): The Effects of the Money Bail System and the Consequences of Failing to Post a Cash-Only Bail

Strictly speaking, those unable to afford a cash-only bail have only one alternative: incarceration.[301] The effects of pretrial incarceration impacts defendants across all social strata, affecting their families, their psyche, and their liberty interests.[302] For example, pretrial detention places burdens on defendants' financial and family situations.[303] Because these defendants are incarcerated and unable to work, their families are deprived of financial and emotional support.[304] The pressing need to provide support for their

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[298] *See, e.g.*, Rabuy, *supra* note 8, at 6–7 (recommending reducing the amount of arrests, stopping the criminalization of failing to pay fines or costs, and eliminating the money bail system altogether); Wiseman, *supra* note 15, at 1364 (advocating for the use of pretrial electronic monitoring in lieu of the money bail system); *see also infra* Sections II.D.2–3.

[299] *See infra* Section II.D.4.

[300] *See id.*

[301] *See* Appleman, *supra* note 12, at 1311 ("[F]ewer indicted offenders . . . who have been granted bail are often unable to afford it. [. . .] [H]igh bail requirements make it very difficult for indicted defendants to obtain pretrial release.").

[302] *See* Standards, *supra* note 181 , § 10-1.1, at 36 ("Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support.").

[303] *See id.*; Neil, *supra* note 9, at 13–14.

[304] *See* Neil, *supra* note 9, at 13–14 (noting the impact that pretrial incarceration has on poor defendants and their families due to the detainee being unable to work); Appleman, *supra* note 12, at 1319–20, 1362 (noting the "emotional and

families—in addition to defendants' limited access to legal aid—leads to these defendants either being convicted for lack of preparedness or, worse yet, pleading guilty to avoid further incarceration.[305] Proponents of bail reform point out that the consequences of money bail punish the accused before conviction and contradict the presumption of innocence.[306] Of course, pretrial incarceration only occurs if a defendant is unable to post bond, or if a judge decides the defendant is too dangerous to be released into the community.[307] Thus, while indigent defendants are those most likely to be unable to post even relatively low bail amounts, indigent defendants who are detained pretrial because of their inability to pay bail are treated as though they are a threat to the community all the same.[308]

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economic hardships" that defendants' families suffered as a result of pretrial incarceration); Wiseman, *supra* note 15, at 1356–57.

[305] *See* Wiseman, *supra* note 15, at 1353–56 (noting pretrial detainees being more likely to be convicted than those released on bail); Wice, *supra* note 46, at 23 (holding that because of the limited contact with their attorneys, pretrial detainees "are far more likely to be found guilty and receive more severe sentences than those released prior to trial"); Appleman, *supra* note 12, at 1320 ("The mere possibility of pretrial imprisonment often compels defendants to plead guilty[, and] . . . when confronted with an unaffordable bail, a large number of pretrial detainees simply plead guilty."); Lester, *supra* note 31, at 50 ("A person in jail is more likely to accept a plea bargain to end his time in jail, especially if probation is offered, than is a person who is out on bail.").

[306] *See* Lester, *supra* note 31, at 12–14 (emphasizing the importance of bail and the presumption of innocence in America's criminal justice system).

[307] *See* Wiseman, *supra* note 15, at 1353.

[308] *See id.* (noting that low-level offenders are jailed with convicted and potentially dangerous defendants who await trial); John Eligon, *Top State Court Says Judges Can't Demand Cash Only Bail*, N.Y. TIMES (Mar. 22, 2015), http://www.nytimes.com/2012/03/23/nyregion/new-york-court-of-appeals-rules-judges-cant-limit-bail-to-cash.html (referencing the negative effects that cash-only bail has on low-income people) (last visited Feb. 2, 2017); *see also* Carlson, *supra* note 176, at 16. Carlson argues:

> [T]hose defendants who can afford the predetermined bail sum are released without judicial examination, while those who cannot are detained. The dispositive difference between these particular populations is their access to money, not the risks they pose. Hinging pretrial liberty upon such a distinction raises issues of public safety as well as questions about the fundamental fairness of a pretrial release system based upon money.

2. Easy-E: Electronic Monitoring as an Alternative to Cash-Only Bail

With the advancement in technology, one scholar has argued that electronic monitoring provides a feasible solution to the rising problem of indigent defendants being too poor to post a cash bail.[309] While electronic monitoring is often used in post-conviction situations,[310] this scholar argues that electronic monitoring may provide a substitute that is at least as effective as cash bail without incarcerating primarily indigent defendants.[311] Further, by continuing to supervise defendants before trial with an electronic monitoring device, this scholar argues that electronic monitoring ensures community safety at a cost much lower than pretrial detention.[312] Pretrial release through electronic monitoring also allows defendants to adequately prepare and defend themselves if their cases go to trial and allows defendants to continue working to support their families.[313]

Notwithstanding the benefits, the implementation of electronic monitoring in the pretrial context has seen little growth.[314] This is because electronic monitoring is primarily used post-conviction,

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Id.

[309] *See* Wiseman, *supra* note 15, at 1364–82.

[310] *See id.* at 1365–67 (noting types of electronic monitoring used before and after sentencing include tether-based programs, voice verification, GPS tracking, and home confinement).

[311] *See id.* at 1372 ("Technology might not be able to completely eliminated detention for flight risk, but it should be able to eliminate detention for poverty.").

[312] *See id.* at 1373 (noting electronic monitoring programs may range from $5 to $25 per day, whereas pretrial detention costs states between $50 to $123 per day); *See id.; See also* Appleman, *supra* note 12, at 1362 ("Although [supervision] services do cost money, in the long term [,] they end up saving far more taxpayer dollars, as it is far more expensive to imprison those indicted offenders waiting for trial than to supervise them electronically at home.").

[313] *See* Wiseman, *supra* note 15, at 1364, 1372; Appleman, *supra* note 12, at 1362 (arguing that electronic monitoring allows pretrial defendants to continue to support their families in spite of ongoing criminal proceedings).

[314] *See* Wiseman, *supra* note 15, at 1374 (noting courts' hesitancy to implement electronic monitoring and admitting that "[e]mpirically, the cost savings of monitoring in lieu of detention require further detailed investigation").

and the number of pretrial electronic monitoring studies and their results remain small and inconclusive.[315] Also, defendants' continued incentive to flee may be one reason why courts believe electronic monitoring is less effective.[316] For example, those given pretrial release through electronic monitoring still tamper with their monitoring devices and abscond.[317] One scholar contends, however, that additional penalties and criminal sanctions for such tampering adequately deter defendants from fleeing or interfering with their devices.[318]

3. Recognize This: Recognizance and Conditional Bonds' Feasibility

Various justice initiative groups and scholars also argue that releasing defendants on their own recognizance provides judiciaries with an effective way of ensuring the defendants' presence at trial without imposing onerous financial requirements to post bail.[319] In deciding an individual's risk of flight and potential danger to the community, these groups advocate for judges to use risk assessments[320] and consider defendants' personal characteristics that may

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[315] *See id.* at 1368, 1371 (noting that electronic monitoring may be at least as effective as money bail, but whether electronic monitoring is more effective than money bail is inconclusive).

[316] *See id.* at 1371–80 (noting other problems with electronic monitoring, including defendants tampering with devices, the costs, privacy concerns, and the incentive to flee without losing money.

[317] *See id.* at 1371.

[318] *See id* at 1371–72 ("These concerns . . . can also be addressed by imposing higher penalties for failing to appear while monitored or for tampering with a monitoring device.").

[319] *See* Neil, *supra* note 9, at 31 ("[T]here is a large proportion of people accused of offenses that can be released on their own recognizance and trusted to comply with pretrial requirements of attending court and avoiding re-arrest."); Johnson, *supra* note 32, at 199 (indicating that recognizance bonds may provide an alternative to low-risk, poor defendants).

[320] *See* Rabuy, *supra* note 8, at 29 (defining risk assessments as "tools that, when used properly, can provide a dependable prediction of whether a person will be involved in pretrial misconduct, whether by failure to appear in court or being a danger to the community"); Neil, *supra* note 9, at 43 (indicating that the use of risk

make them more or less of a flight risk.[321] These factors—including defendants' family and communal ties, employment status, records of defendants' past court appearances, and financial resources—may provide accurate assessments as to defendants' flight risk.[322] These factors may also work as a natural deterrent that ensures defendants do not flee.[323] Moreover, scholars argue that judges' ability to impose court-ordered conditions, such as drug testing, becoming gainfully employed, pursing educational opportunities, or curfews, ensures defendants' continued incentive to be law-abiding and appear for future court dates.[324] Court notification systems have also been suggested to remind defendants of court dates and locations to help defendants appear in court.[325]

On the other hand, many of the same advocates of recognizance bonds, risk assessments, and conditional release at the pretrial stage acknowledge the drawbacks of these alternatives.[326] For example, a study conducted between 1990 and 2004 showed that almost half of the felony defendants who failed to appear in court were

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assessments "provide for informed bail decisions and support judicial officers in having a reliable, bias-free opinion driving his or her determination").

[321] *See* Neil, *supra* note 9, at 30. Neil argues that because people rating higher on risk assessments are generally not released on their recognizance, unsecured recognizance bonds will be reserved for low-risk offenders. *See id.* at 31.

[322] *See id.* at 30–31.

[323] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973 (noting the need for financial conditions in setting bail is unwarranted, as natural deterrents like employment and personal relationships provide defendants with sufficient incentive not to flee).

[324] *See* Johnson, *supra* note 32, at 199; Wiseman, *supra* note 15, at 1363 (explaining that court-ordered conditions and pretrial supervised release programs, when coupled with recognizance bonds, are highly effective and have become the preferred option for many bail reform advocates). However, proponents of court-ordered conditions argue that the conditions must match the defendant's needs, otherwise, these defendants will end up back in custody. *See* Neil, *supra* note 9, at 32 ("Placing inappropriate or unnecessary conditions on people with low risk ratings . . . results in higher failure rates.").

[325] *See* Neil, *supra* note 9, at 32–33 (proposing court notification systems to offset the most common reasons for missing court, including forgetfulness, work, or being in the wrong court room).

[326] *See* Wiseman, *supra* note 15, at 1363 ("[R]elease on personal recognizance . . . is, unsurprisingly, less effective in securing presence at trial.").

those released on their own recognizance.[327] In fact, at least one scholar has pointed out that indigent defendants' lack of financial resources may be one of the reasons why indigent defendants are more of a flight risk in failing to appear in court.[328] Moreover, one justice initiative group has identified some flaws with using risk assessments, noting that using factors like family and community background are unrelated to pretrial conduct and may not provide accurate risk assessments for all defendants.[329] Court-ordered conditions also have their own cost implications, as these conditions require courts to expend more judicial resources, including pretrial supervision, which increases the burden on taxpayers.[330]

4. Don't Shake the Money Maker!: The Benefits of Cash-Only Bail and the Money Bail System

While the arguments providing solutions to the money bail system and its effect on the indigent seem sensible, there are arguments in favor of cash-only bail and the money bail system as a whole.[331] For example, scholars are concerned that setting up individualized bail proceedings that weigh all the defendant's relevant characteristics would be time-consuming, costly, and more

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[327] *See id.* at 1363 n.84 (finding that out of 54,485 felony defendants who failed to appear in court, 20,883 were released on their own recognizance).

[328] *See* Wiseman, *supra* note 15, at 1385 ("[D]efenders of the bail system [may] be able to argue that the same lack of resources that prevents the poor from obtaining release makes them less likely to fear the repercussions of failing to appear for trial.").

[329] *See* Rabuy, *supra* note 8, at 4 n.17. Also, because risk assessments vary by jurisdiction, there is a chance that using these tools could actually increase existing disparities in the criminal justice system between the affluent and the indigent. *See id.*

[330] *See* Wiseman, *supra* note 15, at 1363 (noting that pretrial supervision programs, while highly beneficial, can be highly expensive).

[331] *See* Van De Veer, *supra* note 35, at 848, 874–77; *see also* Wiseman, *supra* note 15, at 1398 (noting the profits that commercial bail bondsmen obtained under the current regime, dubbing it "a multi-billion dollar industry").

difficult.[332] Also, one scholar has argued that cash-only bail is an efficient method of ensuring defendants' appearance in court and keeping the dockets clear.[333] This efficiency occurs because cash bail incentivizes defendants to appear in court so that they may retain their bail money.[334]

Further, cash-only bail may actually lower judicial costs.[335] If accused are able to secure pretrial release without posting a cash-only bail and are subsequently arrested for new offenses, then the additional charges will increase taxpayer costs.[336] These additional criminal charges would also clutter the court dockets.[337] Instead, scholars argue that individuals released on cash-only bonds are more likely to refrain from crime and appear in court out of fear of losing their bail money.[338]

Ultimately, setting bail can be a difficult decision for a judge, as the different factors and circumstances making up a judge's decision may counteract one another.[339] Although a defendant's danger to the community and risk of flight may be relatively low, bail schedules and pressures to be "tough on crime" lead to

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[332] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 975 ("Admittedly, the setting of individualized [bail] conditions poses a more difficult problem than the automatic imposition of bail."); *see also* Rabuy, *supra* note 8, at 4 n.17 (noting the challenges that come with using risk assessments, including the lack of uniformity among jurisdictions that use risk assessments and their questionable accuracy).

[333] *See* Van De Veer, *supra* note 35, at 848, 876–77. Van De Veer goes on explain that the "cash-only bail requirement is also needed to counteract the reduced effectiveness of surety bonds caused by growing failure to honor misdemeanor warrants." *Id.* at 876–77.

[334] *See id.* at 876–77 (arguing that even if the defendant's family posts the defendant's bond, these family members still "tend to make sure the defendant appears in court"); *see also* Wiseman, *supra* note 15, at 1365, 1371 (pointing out that, for obvious reasons, pretrial detention is the only 100% effective method to ensure the defendant's appearance at trial).

[335] *See* Van De Veer, *supra* note 35, at 863.

[336] *See id.*

[337] *See id.*

[338] *See id.* at 876–77. *See also* Wiseman, *supra* note 15, at 1371 (noting that electronic monitoring, recognizance bonds, and other unsecured bonds fail to provide released pretrial defendants with the necessary incentive to return to court).

[339] *See supra* Section II.A.

judges ignoring defendants' ability to pay a particularly high bail amount.[340] The split of authority among the states addressing cash-only bail's constitutionality can be reduced to the different interpretations of "sufficient sureties" based on the history, text, and purpose of the Consensus Right to Bail Clause.[341] Scholars' and justice initiative groups' solutions scratch the surface on how to counteract the money bail system's effect on the poor, but electronic monitoring, unsecured bonds, and recognizance releases have their strengths and weaknesses.[342] Nevertheless, understanding cash-only bail as a systemic problem and recognizing the state courts' oversight of the current system's discrimination against the poor—a group highly represented in the criminal justice system[343]—is imperative towards creating a feasible solution to cash-only bail.[344]

III. NO MONEY, MORE PROBLEMS: CASH-ONLY BAIL'S EFFECT ON THE INDIGENT AND ALTERNATIVES TO THE MONEY BAIL SYSTEM

State courts use a variety of interpretative tools to answer whether cash-only bail is constitutional, including the purpose of bail, the framers' intent, and the textual meaning of the Consensus Right to Bail Clause.[345] The use of these tools, however, fails to address the looming problem of cash-only bail—its effect on indigent criminal defendants, society, and the criminal justice system.[346] Cash-only bail can lead to negative consequences, including false

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[340] *See* Lester, *supra* note 31, at 25–26; Wice, *supra* note 48, at 15, 25.
[341] *See supra* Sections II.C.1-2.
[342] *See supra* Sections II.D.2-3.
[343] *See* Holder, *supra* note 16, at 2 ("[A] disproportionate number of [pretrial detainees] are poor. They are forced to remain in custody—for an average of two weeks . . . because they cannot afford to post the bail required—very often, just a few hundred dollars.").
[344] *See infra* Part III.
[345] *See supra* Section II.C.
[346] *See* Neil, *supra* note 9, at 3 ("The vaguely understood pretrial process of bail costs the taxpayers of the United States billions of dollars and infringes on the liberty and rights of millions of Americans each year.").

convictions,[347] lost wages and family breakdowns,[348] and the increased cost on taxpayers.[349] Ultimately, other than guaranteeing an indigent defendant's presence at trial—through incarceration—cash-only bail fails to further the goals of bails.[350] Such money bail fails to accurately assess a defendant's dangerousness and supplants the presumption of innocence by detaining defendants before conviction based solely on their financial status.[351]

Moreover, while cash-only bail may be a "sufficient surety" for some, it is not "sufficient" for low-income people who do not have the financial resources to post bail.[352] Although the Bail Reform Act of 1984 has allowed courts to consider defendants' danger to the community, or lack thereof, when setting bail,[353] courts should leave behind the abusive practice of using defendants' financial status as a proxy for pretrial incarceration.[354] Further, because most courts do not assess defendants' income or ability make bail,[355] cash-only bail should only be used sparingly—like in

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[347] *See* Appleman, *supra* note 12, at 1305 (noting that impoverished defendants plead guilty, even if innocent, to avoid further pretrial detention).

[348] *See* Neil, *supra* note 9, at 13–14; *see also* Wiseman, *supra* note 15, at 1361 ("[M]oney bail and the high pretrial detention rates associated with this antiquated system impose high burdens on defendants, families, and society.").

[349] *See* Leon Neyfakh, *Is Bail Unconstitutional?: Our Broken System Keeps the Poor in Jail and Lets the Rich Walk Free*, SLATE (June 30, 2015, 7:49 PM), http://www.slate.com/articles/news_and_politics/crime/2015/06/is_bail_unconstitutional_our_broken_system_keeps_the_poor_in_jail_and_lets.html ("Detention should be based on objective evidentiary factors, like whether the person is a danger to the community or a flight risk—not how much money's in their pocket.").

[350] *See supra* notes 169–171 and accompanying text (outlining the overarching goals of bail).

[351] *See* Lester, *supra* note 31, at 12–14.

[352] *See* Lewis Bail Bond Co. v. Gen. Sessions Court, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997) (noting the effect of cash-only bail on those with a lack of financial resources).

[353] *See* sources cited *supra* note 138 and accompanying text.

[354] *See* Appleman, *supra* note 12, at 1311 (noting that imposing high money bail "make[s] it very difficult for poor defendants to obtain pretrial release, despite the fact that the vast majority of these offenders have been arrested for low-level, nonviolent offenses").

[355] *See* Lester, *supra* note 31, at 25 ("[A] court cannot set a reasonable bail for a particular defendant if it makes no inquiry as to how much bail a particular defen-

Trujillo[356] and *Gutierrez*[357] for example, both of which were serious cases involving violent crimes—and only upon careful consideration.[358]

In fact, cash-only bail should be used as the Manhattan Bail Reform Project and the Bail Reform Acts of 1966 and 1984 originally intended secured bonds to be used: only if a defendant's release on recognizance would not likely ensure his presence at trial and only for those defendants most susceptible to flight, violence, or recidivism.[359] Also, the addition of electronic monitoring gives judges a novel alternative to cash bonds that were not available during the earlier periods of bail reform.[360] Alternatives like these do not deplete defendants' or taxpayers' pockets.[361] Further, the remaining states whose courts have not yet decided cash-only bail's constitutionality should carefully consider the effects of their decisions—particularly on the indigent—while also considering alternatives to cash-only bail.[362]

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dant can afford."); *see also* Wice, *supra* note 48, at 14 (finding that a defendant's ability to pay bail is often the least explored aspect of a bail proceeding).

[356] 483 S.W.3d 801 (Ark. 2016).

[357] 140 P.3d 1106 (N.M. Ct. App. 2006).

[358] *See id.* at 162 ("Cash-only bail is the last option and should only be imposed after careful consideration.").

[359] *See* Schnacke, *supra* note 13, at 10 (describing the reasoning behind the Manhattan Bail Reform Project as showing judges many defendants can be released on their own recognizance); Bail Reform Act of 1966, 18 U.S.C. §§ 3146–3152 (repealed 1983) (favoring release on recognizance unless accused is a flight risk); Bail Reform Act of 1984, 18 U.S.C. § 3142(b) (favoring release on recognizance unless accused is a flight risk or danger to community).

[360] *See* Wiseman, *supra* note 15, at 1344 (advocating for the use of electronic monitoring in the pretrial context and arguing that electronic monitoring may be as effective as the money bail and surety system).

[361] *See id.* at 1357, 1361, 1363–64 (describing the burdens that the money bail system places on indigent defendants and the cost to American taxpayers).

[362] *See infra* Section III.C.

A. Money Ain't the Only Thing: Leaving Abusive Bail Practices Behind and Recognizing a Right to Make Bail

The abusive practice of judges setting extraordinarily high bail amounts to keep defendants behind bars—whether to ensure their presence in court, to protect the community, or because of political pressures—dates as far back as the Norman Conquest and has continued even today.[363] Reform efforts throughout English and American history have attempted to combat this abuse of power,[364] but cash-only bail seemingly represents the most recent method of judges imprisoning criminal defendants prior to trial.[365] Throughout history, bail has changed to provide a general right to bail in noncapital cases,[366] provide habeas protection against long delays between arrest and trial,[367] and protect against excessive bail.[368] However, with the recent controversy over cash-only bail,[369] the divide on cash-only bail's constitutionality has become increasingly

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[363] *See* Carbone, *supra* note 56, at 533 (noting the frequency by which judges throughout the history of bail set high bails that accused were unable to obtain); Hegreness, *supra* note 70, at 919 (pointing out judges' abusive practice of setting high bail amounts to detain defendants indefinitely before the passage of the English Bill of Rights); *see also* Wice, *supra* note 48, at 15, 25 (noting that outside pressures from the general public may influence judge's decision in setting bail).

[364] *See generally* Statute of Westminster 1275, 3 Edw. 1 c. 15 (Eng.); English Bill of Rights of 1689, 1 W. & M. Session 2 c. 2 (Eng.); Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3152 (repealed 1983).

[365] *See* State *ex rel* Jones v. Hendon, 609 N.E.2d 541, 544 (Ohio 1993) (ruling that cash-only bail's only purpose is to restrict access to a surety and detain the accused).

[366] *See* Schnacke, *supra* note 13, at 5; *see also* Hegreness, *supra* note 70, at 927–30.

[367] U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended.").

[368] U.S. CONST. amend. VIII ("Excessive bail shall not be required.").

[369] *See* State v. Jackson, 384 S.W.3d 208, 212 (Mo. 2012) ("Although the sufficient sureties provision has been in effect in many states for almost 200 years, cases addressing its meaning do not appear to have arisen until the last few decades.").

more important to combat judges setting cash-only bail amounts that overwhelmingly incarcerate poor defendants.[370]

The current protections and features of bail fail to provide an adequate remedy for poor defendants challenging their cash-only bail amounts.[371] For example, the protection against excessive bail hinges on bail's reasonableness to both ensure the defendant's appearance at trial[372] and guarantee the safety of others.[373] States' excessive bail clauses, however, do not consider a defendant's financial status or ability to make bail.[374] Therefore, courts should allow pretrial defendants to make challenges to cash-only bail under their states' excessive bail clauses and thereby abandon the practice of ignoring an individual's inability to afford bail.[375] Further, when such challenges arise, courts should consider a defendant's actual ability to post the bail the defendant received.[376] By allowing excessive bail claims to move forward when defendants challenge cash-only bail, and if courts analyze each individual's ability to pay the bail that is set, indigent defendants will be protected from unattainable cash-only bonds even as low as $500.[377]

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[370] *See* Appleman, *supra* note 12, at 1305-06, 1310-11 (indicating the effect high bail requirements has on the indigent). *See also supra* Section II.C; Section II.D.1.

[371] *See* Wiseman, *supra* note 15, at 1353 ("Money bail is increasingly not an alternative to pretrial detention but rather an enabler of the practice.").

[372] *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to [assure the accused's presence] is 'excessive' under the Eighth Amendment."); *Jackson*, 384 S.W.3d at 216 (describing bail that is more than necessary to secure the defendant's appearance is excessive).

[373] *See* State v. Briggs, 666 N.W.2d 573, 584 (Iowa 2003).

[374] *See* Foote, *Constitutional Crisis in Bail*, *supra* note 77, at 993 ("[A] mere inability to procure bail in a certain amount does not of itself make such amount excessive."); *see also* Lester, *supra* note 31, at 27 ("Just because bail is set at an amount that a defendant cannot afford does not mean it is per se excessive.").

[375] *See* Wice, *supra* note 48, at 14 (noting that a defendant's ability to post a cash bail is often least explored by judges when setting bail).

[376] *See id.*

[377] *See* Rabuy, *supra* note 8, at 1 n.9 (indicating that when bail was set at less than $500, a majority of New York City residents still could not afford bail); *Bail: An Ancient Practice Reexamined*, *supra* note 124, at 975–77 (advocating for the use of individualized bail determinations).

While courts and scholars alike have determined that a defendant's inability to post bail does not itself render bail excessive,[378] other courts have recognized that cash-only bail may violate states' excessive bail clauses.[379] Therefore, reviewing courts should not be deterred from using excessiveness to strike down a defendant's unattainable cash-only bail.[380] Like the Indiana Court of Appeals recognized in *Sneed*, defendants who are unable to post cash-only bail, and who are neither a flight risk nor a danger to the community, should not be condemned to jail without reason.[381] The trial court's arbitrary decision in *Sneed* constituted an abuse of discretion.[382] Thus, whereas the right to bail is limited,[383] so too should a judge's discretion in setting bail be limited.[384]

Further, with cash bail becoming even more prevalent, and because cash-only bail is a state constitutional issue,[385] a thorough review of the money bail system *at the state level* is necessary to achieve reform.[386] The Supreme Court's decisions in *Stack*, *Carlson*, and *Salerno* caused immense debate about whether a right to bail

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[378] *See supra* note 241 and accompanying text.
[379] *See supra* notes 240–242 and accompanying text
[380] *See Briggs*, 666 N.W.2d at 584 (noting that the use of cash-only bail could violate the excessive bail clause without violating the sufficient sureties clause).
[381] *See* Sneed v. State, 946 N.E.2d 1255, 1260 (Ind. Ct. App. 2011).
[382] *See id.* at 1256–61 (holding that the trial court abused its discretion rather than rendering cash-only bail unconstitutional).
[383] *See* Schnacke, *supra* note 13, at 9 (indicating bail as a fundamental, but limited right).
[384] *See, e.g.*, Lewis Bail Bond Co. v. Gen. Sessions Court, No. C-97-62, 1997 WL 711137, at *5 (Tenn. Ct. App. Nov. 12, 1997) (finding that a judge's discretion in determining bail and conditions of release is limited to the factors set out in state statutes); *see also* State *ex rel.* Sylvester v. Neal, 14 N.E.3d 1024, 1032-33 (Ohio 2014) (holding that, notwithstanding the trial court's discretion in setting bail, requiring cash-only bail restricts the accused's access to a surety in violation of Ohio's sufficient sureties' clause).
[385] *See* State v. Barton, 331 P.3d 50, 55 (Wash. 2014) (en banc) (describing cash-only bail as a state constitutional question).
[386] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973 (addressing the need for a thorough review of bail and arguing for the judges to abandon the assumption that financial conditions are necessary in setting bail).

actually exists.[387] These decisions require that criminal defendants be given a reasonable *opportunity* to make bail.[388] However, it is ultimately up to state courts to interpret their sufficient sureties' clause in a way that provides defendants accused of noncapital offenses with this opportunity to make bail.[389] In doing so, courts reviewing challenges to cash-only bail should look beyond its history and purposes.[390] Recognizing that cash-only bail fails to provide indigent defendants with an opportunity to make bail—and therefore does not constitute a sufficient surety for poor defendants seeking pretrial release—is necessary for implementing solutions.[391]

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[387] *Compare* Stack v. Boyle, 342 U.S. 1, 6 (1951) (describing a defendant's right to bail as unequivocal), Foote, *Constitutional Crisis in Bail, supra* note 77, at 969–89 (arguing that a right to bail is implied in the Constitution), Hegreness, *supra* note 70, at 915–16 (inviting the Supreme Court to revisit *Salerno* and "recognize the centrality of bail to the constitutional history of the states and to protect it under the Fourteenth Amendment), *and* Lester, *supra* note 31, at 1–2, 14–15 (indicating defendants have a right to bail to ensure their presumption of innocence), *with* Carlson v. Landon, 342 U.S. 524, 545 (1952) (rejecting any absolute right to bail from the Eighth Amendment's Excessive Bail Clause and holding "the very language of the [Eighth] Amendment fails to say all arrests must be bailable"), *and* United States v. Salerno, 481 U.S. 739, 754–55 (1987) ("The Court in *Stack* had no occasion to consider whether the Excessive Bail Clause requires courts to admit all defendants to bail.").

[388] *See Stack*, 342 U.S. at 10 (Jackson, J., concurring); *see generally* sources cited *supra* note 387 (acknowledging or conceding to defendants' right to a reasonable opportunity to make bail). Such an opportunity to post bail or alternative to cash-only bail could also be in the form of a surety arraignment between the defendant and a third-party. *See Barton*, 181 Wash. 2d at 156–58, 162; *Sylvester*, 14 N.E.3d at 1033.

[389] *See, e.g.*, State v. Briggs 666 N.W.2d 573, 582 (Iowa 2003) (ruling that sufficient surety language created a right to access a surety in some form, but not any form without limit).

[390] *See supra* Sections II.C.1–2 (indicating that courts look to the history, purpose, and intent of the framers when analyzing cash-only bail under the sufficient sureties clause).

[391] *See* State ex rel. Sylvester v. Neal, 14 N.E.3d 1024, 1032–33 (Ohio 2014) (noting that cash-only bail only allows the wealthy to obtain pretrial release, while the poor continued to be detained).

Further, allowing defendants access to more than one form of surety may close the gap in pretrial detention based on wealth disparity.[392]

B. Money on States' Mind: The Need for States to Address the Bigger Picture

Currently, state courts and trial judges use bail schedules and money bail to standardize and expedite the bail-setting process.[393] Bail schedules and money bail also seek to increase courtroom efficiency by keeping dockets clear and preventing defendants from missing court.[394] The result of such practices, however, has led to many poor defendants awaiting trial from a jail cell instead of being with their families, working, or preparing their criminal cases.[395] The cost to the taxpayers alone should be enough incentive for the government and voters alike to work towards a better solution.[396] Since bail is meant to protect the presumption of innocence, state courts deciding cash-only bail's constitutionality should consider its effect on the indigent and move for a more individualized bail process.[397] Without an individualized inquiry into defendants' abil-

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[392] *See* Rabuy, *supra* note 8, at 1 n.9 (noting that 60% of pretrial detainees fall within the poorest one-third of Americans and 80% fall within the bottom one-half of the poverty scale); *see also* People ex rel. McManus v. Horn, 18 N.Y.3d 660, 675 (2012) (prohibiting case-only bail and holding judges may not fix only one form of bail).

[393] *See* Neil, *supra* note 9, at 22–23 (describing bail schedules as an attempt to standardize bail proceedings); *see also* Carlson, *supra* note 176, at 13–14, 16–17 (pointing out bail schedules' flaws and the risks they pose to poor defendants).

[394] *See* Van De Veer, *supra* note 35, at 876–77 (noting the increased efficiency of courts when cash-only bail is imposed).

[395] *See* Neil, *supra* note 9, at 3, 13–14.

[396] *See* Holder, *supra* note 16, at 2 (estimating the cost of pretrial detain to taxpayers at nine billion dollars per year).

[397] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 974 ("To establish a system of pretrial release which will accommodate the presumption of innocence and the desire to secure the attendance of the accused at trial, a thoroughgoing revision of other practices and assumptions is necessary.").

ity to make bail, bail schedules and cash-only bail will continue to lead to indigent defendants' detention rather than release.[398]

To solve the problems the money bail system has created, judges should first steer clear of bail schedules.[399] Instead, courts should weigh all the appropriate factors and interests when setting bail[400] and determine bail on an individualized basis.[401] Proponents of the current money bail system believe that the use of bail schedules and cash-only bail increases efficiency within the courts, which are often flooded due to defendants jumping bail.[402] These proponents, therefore, believe cash-only bail saves time, money, and judicial resources.[403] However, the current spending and costs to incarcerate pretrial detainees cost more than the profits gained through the use of bail schedules and cash-only bail.[404] An individualized inquiry, on the other hand, more accurately assesses defendants' dangerousness to the community and likelihood of appearing in court, which protects defendants from pretrial incarceration and saves defendants and taxpayers more money.[405]

Next, courts must recognize that ensuring a defendant's presence at trial or retaining judicial discretion in setting bail are not

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[398] *See* Lester, *supra* note 31, at 26 ("The result [of bail schedules] is a 'going rate' for bail at the initial appearance and an inadequate examination of the defendant's ability to pay. As a consequence, defendants may be unnecessarily and unconstitutionally incarcerated. This is especially true of indigent defendants.").

[399] *See Standards*, *supra* note 181 § 10-5.3(e) cmt. at 113. The American Bar Association has expressly rejected the use of bail schedules, indicating, "[t]he practice of using bail schedules leads inevitably to the detention of some persons who would be good risks but are simply too poor to post the amount of bail required by the bail schedule." *Id.*

[400] *See supra* notes 169–175 and accompanying text.

[401] *See Standards*, *supra* note 181, § 10-5.3(e) cmt. at 113 (emphasizing "the importance of setting financial conditions through a process that takes account of circumstances of the individual defendant").

[402] *See* Van De Veer, *supra* note 35, at 863.

[403] *See id.* at 848, 863, 876–77 (noting the increase costs to the criminal justice system due to bail jumping and proposing cash-only bail as a solution).

[404] Carlson, *supra* note 176, at 16–17 (noting the costs associated with judges using bail schedules); *see also* Holder, *supra* note 16, at 2.

[405] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973–77 (arguing for an individualized bail-setting process).

the only purposes of bail, as defendants' liberty interests must also be considered.[406] A judge's discretion to set bail has stood since colonial America,[407] and, by interpreting the Consensus Right to Bail Clause broadly, courts have held that cash-only bail is one of many discretionary methods constituting a sufficient surety.[408] However, no amount of judicial discretion should trump an accused's right to the presumption innocent before conviction.[409] In order to address cash-only bail's constitutionality, states have resorted to technical, interpretative tools instead of looking at its discriminatory effect.[410] Recognizing cash-only bail's disparate impact on indigent defendants and focusing on defendants' financial ability to make bail is crucial for courts to adequately analyze cash-only challenges.[411]

It is important for courts to consider the nature and seriousness of the offense when setting bail, even with cash-only bail, as trial courts absolutely must consider the seriousness of the charged offense when determining the amount and form of bail.[412] However, cash-only bail should be reserved for the truly dangerous defendants, rather than those nonviolent, indigent defendants unable to

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[406] *See* State v. Brooks, 604 N.W.2d 345, 350, 352–54 (Minn. 2000) (en banc) (indicating that the primary purpose of bail is to protect the accused's liberty interest and that cash-only bail fails to further that interest).

[407] *See* Foote, *supra* note 77, at 968 (indicating that among the elements the framers took from English Parliament with respect to bail was the distinction between bailable offenses, nonbailable offenses, and those offenses left to the discretion of the judges who determine a defendant's ability to make bail).

[408] *See* Trujillo v. State, 483 S.W.3d 801, 806 (Ark. 2016); State v. Briggs, 666 N.W.2d 573, 582 (Iowa 2003).

[409] *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (noting the importance of maintaining access to bail to uphold the presumption of innocence).

[410] *See supra* Section II.C; Section II.D.1.

[411] *See* State *ex rel* Jones v. Hendon, 609 N.E.2d 541, 544 (Ohio 1993); *see also Trujillo*, 483 S.W.3d at 809 (Brill, C.J., dissenting) (noting the effect of cash-only bail on those of low-income).

[412] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 974; *see also* Lester, *supra* note 31, at 23; Lester, *supra* note 31, at 23.

pay low cash-only bail amounts.[413] Trial courts should also exhaust other alternatives to cash-only bail first, and use cash-only bail only as a last resort.[414] This allows judges to retain their discretion in determining bail while ensuring that they only use cash-only bail when the situation calls for it.[415]

Although cash-only bail incentivizes individuals able to post bail, appear in court, and recuperate their bail money, cash-only bail fails to reach those indigent defendants who lack the financial resources to post bail in the first place.[416] Because bail seeks to ensure defendants' appearance at trial, proponents of cash-only bail argue that cash-only bail not only makes defendants' appearances more likely, but also creates a financial incentive for defendants to appear by retaining their bail money.[417] However, this argument unravels when the bulk of the system's subjects do not have the money to trigger the incentive.[418] If defendants cannot scrape together enough money to post bond, then the incentive to appear in court disappears, and courts are left with overcrowded jails and detention centers.[419] Thus, eliminating this incentive-driven program requires courts to shift their focus *away* from money and mass incar-

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[413] *See, e.g.*, State v. Gutierrez, 140 P.3d 1106, 1111 (N.M.2006) (murder and manslaughter charges); Trujillo v. State, 483 S.W.3d 801, 801 (Ark. 2016) (assault and battery charges).

[414] *See Gutierrez*, 140 P.3d at 1111 (cautioning trial judges in exercising their discretion when setting bail and impose cash-only bail as a last resort).

[415] *See id.*; *see also* State v. Briggs, 666 N.W.2d 573, 582 (Iowa 2003) (noting the importance of judges using their discretion when setting bail).

[416] *See* Neil, *supra* note 9, at 13–15 (describing cash bail's effect on the indigent).

[417] *See* Van De Veer, *supra* note 35, at 876–77 (noting cash bail keeps defendants from fleeing and incentivizes them to appear in court); Fragoso v. Fell, 111 P.3d 1027, 1032–33 (Ariz. Ct. App. 2005) (finding cash-only bail constitutional as a means of ensuring defendants' presence in court); Briggs, 666 N.W.2d at 581–85 (indicating cash-only bail achieves the purpose of securing the accused's presence at trial).

[418] *See* Appleman, *supra* note 12, at 1310–12 (noting that a large portion of jail populations consist of pretrial defendants unable to post bail and that states are "[i]ncarcerating poor defendants for nonfelony offenses").

[419] *See id.* at 1301; Wice, *supra* note 48, at 22 (noting the extent of jail and prison overcrowding).

ceration and *towards* preserving innocence, preventing punishment before conviction, and freedom.[420]

Despite cash-only bail's deficiencies, proponents of cash-only bail and the current system stand firm.[421] These proponents argue that imposing cash-only bail is a reasonable means of not only ensuring the defendant's appearance in court, but also securing the safety of the community.[422] Cases like *Trujillo*[423] and *Gutierrez*,[424] may lead courts to determine that cash-only bail is constitutional simply because the interest in community safety and securing defendants' presence at trial outweighs defendants' liberty interests in pretrial release.[425] However, these cases should be the exception, not the rule.[426] The defendant in *Trujillo* battered his pregnant girlfriend and her son.[427] The defendant in Gutierrez was indicted on multiple counts of murder and manslaughter.[428] While these courts had legitimate concerns of the defendants' potential dangerousness to the community,[429] most pretrial detainees are nonviolent.[430] For exam-

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[420] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 969-70 (emphasizing the importance of the presumption of innocence in America's criminal justice system); State v. Rodriguez, 628 P.2d 280, 284 (Mont. 1981) (acknowledging that cash-only bail "may well deprive a person of his liberty before trial and clash with the presumption of innocence"); Two Jinn, Inc. v. Dist. Court of the Fourth Judicial Dist., 249 P.3d 840, 847 (Idaho 2011) (describing bail as having two purposes: "to prevent the punishment of innocent persons and at the same time compel the presence of the prisoner when required").

[421] *See, e.g.*, Van De Veer, *supra* note 35, at 848, 876–77 (proposing that increasing the use of cash-only bail may help ameliorate the harms caused by outstanding warrants and defendants' failure to honor those warrants). *But see, e.g.*, *Bail: An Ancient Practice Reexamined*, *supra* note 124, at 970–71 (pointing out the flaws with the money bail system and its ineffectiveness in deterring flight and accommodating the presumption of innocence).

[422] *See* Lester, *supra* note 29, at 3.

[423] Trujillo v. State, 483 S.W.3d 801 (Ark. 2016).

[424] State v. Gutierrez, 140 P.3d 1106 (2006).

[425] *See id.* at 161.

[426] *See* Appleman, *supra* note 12, at 1331 (indicating that the 1984 Bail Reform Act, at least in form, reaffirmed that pretrial release was to continue to be the norm).

[427] *Trujillo*, 483 S.W.3d at 802.

[428] *Gutierrez*, 140 P.3d at 1107.

[429] *See id.* at 1107; Trujillo, 483 S.W.3d at 802.

ple, cases like *Fragoso v. Fell*,[431] *State v. Briggs*,[432] and *Saunders v. Hornecker*[433] dealt with nonviolent defendants unable to post cash-only bail.[434] These courts all held that cash-only bail was constitutional notwithstanding the defendants' low-level offenses.[435] While protecting the community against violent offenders may provide an adequate justification for cash-only bail, protecting the community from indigent, nonviolent offenders fails to justify cash-only bail entirely.[436]

The shortcomings of money and cash-only bail outweigh many of their benefits, as the failings of the current system and its effects on the indigent remain.[437] Bail schedules have proven to be unworkable,[438] and focusing on the nature of the offense and the need to secure dangerous defendants' appearance at trial has lumped in indigent, nonviolent offenders in a financial-incentive system in which they do not belong.[439] Courts faced with cash-only bail challenges in the future should address the bigger issue of its unfairness

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[430] *See* Appleman, *supra* note 12, at 1311.
[431] Fragoso v. Fell, 111 P.3d 1027 (Ariz. Ct. App. 2005).
[432] State v. Briggs, 666 N.W.2d 573 (Iowa 2003).
[433] Saunders v. Hornecker, 344 P.3d 771 (Wyo. 2015).
[434] *See Fragoso*, 111 P.3d at 1029 (charging defendant as a co-conspirator to sell marijuana); *Briggs*, 666 N.W.2d at 574–75 (charging defendant with prostitution); Saunders, 344 P.3d at 774 (charging two of three defendants with nonviolent offenses—interference with a police officer and failure to maintain liability coverage—while the third defendant was charged with aggravated assault).
[435] *See* cases cited *supra* at 435.
[436] *See* Lester, *supra* note 31, at 25 ("Unless the defendant threatened to potential witnesses, it is improper for the court to look at anything beyond the defendant's finances in setting bail.").
[437] *See* Trujillo v. State, 483 S.W.3d 801, 809 (Ark. 2016) (Brill, C.J., dissenting) ("[C]ash-only bail has drawbacks [as i]t may have an unfair, even disparate impact, upon lower-income defendants without resources [and] . . . may be used punitively.").
[438] *See supra* notes 179–181 and accompanying text (pointing out the flaws associated with judges' use of bail schedules on criminal defendants).
[439] *See* Appleman, *supra* note 12, at 1336 (criticizing the 1984 Bail Reform Act's emphasis on a defendants' future dangerousness in setting bail questioning state's compliance with the Act despite its deficiencies).

to many pretrial defendants,[440] and consider the alternatives to money bail.[441]

C. Proceed with Caution: Alternatives to Cash-Only Bail

Alternatives are available for judges to use to counteract the adverse effects of cash-only bail on the indigent.[442] Electronic monitoring, for example, allows defendants to live and work in their communities, thereby promoting defendants' liberty interests while costing less than pretrial incarceration.[443] In addition, recognizance bonds provide a cash-free alternative for those low-risk, low-income defendants who would otherwise await trial from a jail cell or plead guilty to avoid further incarceration.[444] These alternatives consider the past successes of bail reform in America, but also look to technology to provide indigent defendants with an alternative to pretrial detention.[445] States should still, however, proceed with caution in considering these alternatives, as they still pose problems and potential abuse.[446]

1. Welcome to the New Age: Electronic Monitoring as an Alternative to Cash-Only Bail and the Money Bail System

States may utilize electronic monitoring to supervise defendants in the community before trial instead of imposing cash-only bail to incarcerate them.[447] Electronic monitoring is an effective alternative that furthers the accused's liberty interests before

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[440] *See* Carlson, *supra* note 176, at 16 (noting that the money bail system "raises . . . questions about the fundamental fairness of a pretrial release system based upon money").
[441] *See supra* Sections II.D.2–3; *infra* Section III.C.
[442] *See infra* Sections III.C.1–2.
[443] *See infra* Section III.C.1.
[444] *See infra* Section III.C.2.
[445] *See infra* Sections III.C.1–2
[446] *See infra* Sections III.C.1–2.
[447] *See* Wiseman, *supra* note 15, at 1364–80.

conviction while also assuring the accused's presence at trial.[448] The costs of electronic monitoring are low, and, in comparison to detaining defendants before trial, electronic monitoring would cut spending almost in half.[449] Moreover, these electronic monitoring devices allow defendants to work and continue to support their families in between arrest and trial, which is particularly important to low-income defendants, whose pretrial detention has a greater effect on their families.[450] Offering electronic monitoring to indigent defendants to secure pretrial release would also help them better prepare their criminal cases and reduce the likelihood of conviction.[451]

The benefits to the defendants that stem from electronic monitoring are enormous.[452] Defendants released on electronic devices are able to see their families and can continue to provide support for them by working and retaining their jobs.[453] Their presence out in the community is critical for those too poor to post a cash bail, as defendants' families need them for financial and emotional support.[454] Similarly, because electronic monitoring allows defendants to be out in the community and meet with their attorneys more freely, electronic monitoring may lead to better outcomes for

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[448] *See id.* at 1364 ("Increasingly advanced technologies are able to closely monitor pretrial defendants' locations while granting them far greater freedom. . . .").
[449] *See id.* at 1373 (noting pretrial detention costs between $50 to $123 dollars per day and electronic monitoring costs between $5 to $25 per day).
[450] *See id.* at 1356–57, 1363.
[451] *See id.* at 1356 ("The difficulty of preparing an adequate defense makes the likelihood of success at trial much lower for pretrial detainees than for those who have secured release."); *see also* Neil, *supra* note 9, at 13–14 (noting the impact money bail has on poor pretrial defendants in preparing adequate defenses and the increased likelihood of poor defendants to plead guilty to avoid further detention).
[452] *See* Wiseman, *supra* note 15, at 1364.
[453] *See* Appleman, *supra* note 12, at 1362 ("Allowing indicted offenders out on bail with the help of electronic monitoring permits them to save their jobs, pay their bills, keep their homes and see their families.").
[454] *See id.* at 1319–20, 1362 (noting family members of a criminal defendant detained pretrial suffer "emotional and economic hardships"); Wiseman, *supra* note 15, at 1374; *see also* Neil, *supra* note 9, at 13–14 (noting the impact that pretrial incarceration has on poor defendants and their families due to the detainee being unable to work).

indigent defendants' criminal cases and less false convictions.[455] The obstacles that pretrial detention creates for defendants in preparing an adequate defense dissipate when defendants are able to freely meet and discuss their cases with their attorneys out in the community rather than from jail.[456] Further, electronic monitoring reinforces defendants' expectation of pretrial release by granting indigent pretrial detainees their freedom before conviction and preserving the presumption of innocence.[457]

The most plausible argument against electronic monitoring is the reduced incentive to appear in court.[458] Whereas those released on a cash bond have incentive to appear in court and recuperate their bail money,[459] defendants released on electronic monitoring devices have no collateral on the line to keep them from fleeing.[460] Considering the fact that indigent pretrial defendants lack financial resources to post bail to begin with, electronic monitoring provides no additional incentive for indigent defendants to show up

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[455] *See* Appleman, *supra* note 12, at 1320 (indicating that "[t]he mere possibility of pretrial imprisonment often compels defendants to plead guilty and give up their right to trial"); Wiseman, *supra* note 15, at 1354–56, 1364 (arguing that pretrial electronic monitoring in lieu of incarceration allows pretrial defendants—who often plead guilty to avoid further incarceration—more opportunities to consult with their attorneys).

[456] *See* Wiseman, *supra* note 15, at 1364; *see also* Neil, *supra* note 9, at 13 (noting the hardships pretrial defendants face in trying to prepare an adequate defense to criminal charges while incarcerated, including the inability to "gather witnesses [] and other activities need to present a strong case due to limited phone use, obligations to work long shifts in jail programs, [and] placement in jails long distances away from their counsel").

[457] *See* Wiseman, *supra* note 15, at 1364; *see also* Lester, *supra* note 31, at 8–14, 50-53 (noting the role the presumption of innocence plays in the criminal justice system and how pretrial detention impacts defendants).

[458] *See* Wiseman, *supra* note 15, at 1368–72 (highlighting the concern that electronic monitoring will never completely eradicate defendants' urge to flee); *see also* Van De Veer, *supra* note 35, at 848–49, 876–77 (arguing in favor of cash-only bail and the money bail system because of its effectiveness in ensuring defendants appearance in court compared to nonfinancial bail conditions).

[459] *See* Van De Veer, *supra* note 35, at 876–77.

[460] *See* Wiseman, *supra* note 15, at 1371 ("No matter how ingenious the technology, it is likely that highly motivated defendants will find a way to defeat it.").

to court.[461] Thus, opponents of electronic monitoring see electronic monitoring not as an alternative, but as a waste of judicial resources.[462]

However, while electronic monitoring may not completely eradicate a defendant's desire to flee, defendants who abscond from an electronic monitoring device will be in no worse position than if they received a secured bond.[463] Judges typically either impose a secured bond or incarcerated defendants for absconding from their electronic monitoring devices.[464] Therefore, pretrial release via electronic monitoring still gives defendants incentive to appear in court.[465] This incentive to appear in court when released via electronic monitoring is at least as effective as cash-only bail in ensuring a defendant's appearance in court.[466]

The effectiveness of electronic monitoring in the pretrial context continues to give courts pause, however, because electronic monitoring is typically used during post-conviction proceedings, not during pretrial.[467] Many jurisdictions have not adopted electronic monitoring programs because the statistics on electronic monitoring's effectiveness in the pretrial phase are inconclusive.[468] As a result, money bail has remained judges' preferred option for pretrial release.[469] However, electronic monitoring still addresses the over-

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[461] *See id.* at 1385 (pointing out that the lack of financial resources reduces defendants' incentive to appear in court).

[462] *See* Van De Veer, *supra* note 35, at 864 n.82, 876–77 (noting the waste of judicial resources when defendants fail to appear in court and the incentive to appear that cash-only bail provides).

[463] *See* Wiseman, *supra* note 15, at 1371–72 (noting that judges may impose sanctions and penalties on defendants released on electronic monitoring who either fail to appear in court or tamper with their devices).

[464] *See id.*

[465] *See id.*

[466] *See id.* at 1372 ("[Electronic monitoring] has the potential to effectively replace unmeetable monetary requirements for non-dangerousness defendants.").

[467] *See id.* at 1368-69.

[468] *See id.*

[469] *See* Neil, *supra* note 9, at 17 ("[A]s many jurisdictions do not have . . . pretrial monitoring programs in place, judicial officers continue to rely on money bail as a release option."); *see also* Wice, *supra* note 48, at 10 (noting judges impose cash bail most frequently).

arching problem that the money bail system has created—that is, the overwhelming pretrial incarceration of poor, nonviolent defendants.[470] Thus, judges in these jurisdictions should experiment with electronic monitoring in the pretrial context, particularly on nonviolent, low-level offenders, as this alternative to money bail significantly reduces the cost of pretrial release.[471] While electronic monitoring has its own costs associated with it, this alternative cuts communities' costs considerably, as incarcerating defendants pretrial costs more than supervising them out in the community electronically.[472]

Ultimately, while further inquiry is needed in determining electronic monitoring's pretrial effectiveness, electronic monitoring provides a feasible solution to money bail.[473] Electronic monitoring is a substantial improvement over incarceration, as this alternative furthers defendants' liberty interests and decreases the costs to the criminal justice system overall.[474] Thus, courts should consider using electronic monitoring in those instances where cash-only bail and money bail would fail to serve the interests of defendants, the courts, or the community.[475]

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[470] *See* Wiseman, *supra* note 15, at 1372 (arguing that electronic monitoring may eliminate the pretrial detention of the poor).

[471] *See id.*

[472] *See id.* at 1372 (noting that electronic monitoring programs can "generate significant savings if used in place of pretrial detention"); *see also* Appleman, *supra* note 12, at 1362 (arguing that electronic monitoring programs save taxpayers more money than imprisoning indicted offenders).

[473] *See* Wiseman, *supra* note 15, at 1378 ("[W]hile future proposed uses of monitoring technology should be carefully scrutinized, this necessarily somewhat vague threat should not prevent its use to help the very real people currently in jail.").

[474] *See id.* at 1372, 1380 ("[E]lectronic monitoring is a major improvement over imprisonment, [and] the gap between rich and poor will be narrowed significantly by using [electronic monitoring] in place of imprisonment for failure to post bond."); *see also* Appleman, *supra* note 12, at 1362.

[475] *See* Wiseman, *supra* note 15, at 1374 (arguing that electronic monitoring "can be at least as cheap and effective as money bail"); *see also* Appleman, *supra* note 12, at 1304, 1362 (advocating for the increased use of electronic monitoring in bail surveillance to combat prison overcrowding and help pretrial detainees obtain pretrial release).

2. Recognizance over Money: Release on Recognizance as an Alternative to Cash-Only Bail and the Money Bail System

Releasing low-income defendants accused of nonviolent, low-level offenses on their own recognizance achieves the overall goals of bail without infringing on defendants' liberty interests in the way that money bail infringes on defendants' liberty interests.[476] The use of risk assessments and individualized bail proceedings—including an inquiry into defendants' financial capacity—will help judges determine which defendants require a secured bond and which could be released on their own recognizance.[477] Like the Manhattan Bail Project, in which less than 1% of pretrial defendants released on their own recognizance failed to appear for trial,[478] courts could revive the same or similar scheme and seek recommendations for those likely to appear under their own recognizance.[479] The Project's success lead the way for nonfinancial conditions and pretrial release to become the norm.[480] Therefore, trial courts should consider recognizance bonds as well as the past success of unsecured releases when setting bail.[481]

With no security or collateral offered, however, recognizance bonds are arguably the least effective nonfinancial alternative to money bail, as it fails to incentivize even misdemeanor defendants to appear in court.[482] Further, without collateral or incentive,

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[476] *See* Neil, *supra* note 9, at 31.

[477] *See id.* at 27–31 (noting that those with higher risk assessments do not receive recognizance bonds); *see also Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973–77 (arguing against the use of money bail and for personalized considerations in setting bail).

[478] *See* Schnacke, *supra* note 13, at 9 (noting the success of the Manhattan Bail Projects success in securing pretrial defendants' appearance in court).

[479] *See* Neil, *supra* note 9, at 31, 43 (noting many people can be released on their own recognizance and that the use of risk assessments can help judges make informed bail decisions).

[480] *See* Carbone, *supra* note 56, at 553.

[481] *See* Neil, *supra* note 9, at 31.

[482] *See* Wiseman, *supra* note 15, at 1363 (noting the lack of effectiveness recognizance bonds have on securing defendants' presence at trial).

those released on their own recognizance may pose a threat to the community, which justifies judges imposing money or cash-only bail to ensure both their compliance with the law and future appearance in court.[483] However, while felony defendants released on their own recognizance have a tendency to flee,[484] many pretrial detainees are accused of nonviolent, misdemeanor offenses.[485] This indicates that recognizance bonds may be most effective to the group that would benefit most from their use—indigent, nonviolent pretrial defendants accused of low-level misdemeanors.[486]

Also, natural deterrents—such as family and communal ties, employment, or incarceration for absconding or committing new crimes—provide defendants with the same incentive to be law-abiding and appear in court as if they were released on a cash bond.[487] While an indigent defendant's lack of financial resources may make the defendant more of a flight risk,[488] these natural deterrents offset an indigent defendant's increased likelihood to flee on a recognizance bond.[489] Implementing notification systems reminding defendants of their court dates, times, and locations may also help

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[483] *See* Appleman, *supra* note 12, at 1330 (finding the safety of the community as a factor often considered by judges when setting bail); *see also* Hegreness, *supra* note 70, at 962 (indicating that states followed the 1984 Bail Reform Act, making it lawful to deny bail to persons the court believe pose a danger to the community).

[484] *See* Wiseman, *supra* note 15, at 1361 n.84 (describing one study that found roughly half of felony defendants who failed to appear in court were released on their own recognizance).

[485] *See id.* at 1346; *see also* Neil, *supra* note 9, at 18 (noting the number of nonviolent offenders detained pretrial); *see generally* Neyfakh, *supra* note 349 (highlighting the injustice cash bail has on indigent defendants accused of low-level, misdemeanor crimes).

[486] *See* Appleman, *supra* note 12, at 1311 (noting the vast majority of offenders unable to obtain pretrial release are arrested for low-level, nonviolent offenses).

[487] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973 (noting that natural deterrents like employment and personal relationships provide defendants with incentive not to flee, such that preconditioning pretrial release on financial status is unnecessary).

[488] *See* Wiseman, *supra* note 15, at 1385 (pointing out that indigent defendants' lack of resources the same lack of financial resources that prevents them from obtaining pretrial release also makes these defendants more likely to flee).

[489] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973.

reduce the number of court absences, as many missed court appearances result from extraneous factors in defendants' lives, not from defendants fleeing before trial.[490] Further, judges should not be distracted by political motives or communal pressures to be "tough on crime."[491] Because these outside pressures have caused many of the problems that are prevalent in today's criminal justice system,[492] judges should focus on the individual defendant when setting bail, not conform to public or political pressures by setting high bail amounts for those who cannot reach them.[493]

Ultimately, alternatives to cash-only bail and the money bail system must be considered to eliminate the costs and consequences of detaining indigent defendants pretrial.[494] The practice of setting high cash bails that defendants cannot afford should be abandoned and courts should use the excessive bail clause and the sufficient sureties' clause as a means of allowing defendants the opportunity to post an attainable bail.[495] Also, future courts confronted with the constitutionality of cash-only bail should recognize its effect on the indigent instead of focusing exclusively on dangerousness or malleable interpretative tools.[496] Trial courts deciding whether to impose cash-only bail should (1) adhere to *all* of the factors in setting bail;

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[490] *See* Neil, *supra* note 9, at 33–35 (advocating for the use of notification systems to offset the number of defendants failing to appear in court due to illness, work, confusion, or forgetfulness).

[491] *See* Wice, *supra* note 48, at 15, 25 (indicating that newspapers and public opinion may exert outside pressures on judges, causing them to be more cautious in granting pretrial release).

[492] *See supra* Section I.C.3 (describing the public concern over increased crime rates in the 1970s and 80s that lead to President Nixon's "war on crime' and the 1984 Bail Reform Act).

[493] *See* Lester, *supra* note 31, at 44, 54 (pointing out that fear of political backlash may cause judges to lean towards incarceration instead of release, but arguing for courts to "protect themselves from emotional knee-jerk reactions," "eliminat[e] extraneous considerations," and "give all defendants the due process they are required by the Constitution").

[494] *See Bail: An Ancient Practice Reexamined*, *supra* note 124, at 973 ("The assumption that pretrial release must, in all cases, be conditioned on the posting of financial security should be discarded.").

[495] *See supra* Section III.A.

[496] *See supra* Section III.B.

(2) carefully consider a defendant's danger to the community; and, (3) when appropriate, use nonfinancial conditions and alternatives for the defendant's pretrial release.[497]

CONCLUSION

The overwhelming number of indigent criminal defendants that are detained before trial—only because these defendants are too poor to post bail—has demonstrated the need for reform.[498] The current bail system is predicated on courts' needs to ensure defendants' future appearance in court, while the system focuses almost exclusively on defendants' potential danger to the community rather than defendants' liberty interests.[499] The most recent judicial tool judges use to secure defendants' appearance in court is cash-only bail.[500] States are split as to whether cash-only bail violates the accused's constitutional right to be bailable by sufficient sureties.[501] Ultimately, there are effective, efficient, and more cost-friendly solutions to the current bail system that are readily available for courts and legislatures to implement.[502] These alternatives operate to secure defendants' pretrial release and protect defendants' interest in freedom before conviction.[503] For "[i]n our society liberty is the norm,"[504] and if courts can deny a person their freedom by imposing

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[497] *See supra* Sections III.B–C.

[498] *See* Wiseman, *supra* note 15, at 1403 ("At any given time, thousands of criminal defendants around the country are imprisoned to ensure their presence at trial despite being eligible for release, simply because they lack the financial resources to make bail.").

[499] *See supra* Part I.

[500] *See supra* Part II.

[501] *See supra* Section II.C.

[502] *See* Wiseman, *supra* note 15, at 1403 ("In the absence of judicial action, thousands of criminal defendants will continue to be detained—and suffer all of the deleterious effects of detention—long after available technology would allow the government to achieve its goals at lower financial and human cost."); *see also supra* Section III.C.

[503] *See supra* Sections II.D.2; Section III.C.

[504] United States v. Salerno, 481 U.S. 739, 755 (1987).

cash-only bail, then "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[505]

[505] Stack v. Boyle, 342 U.S. 1, 4 (1951).